Info

VERSIONS: Full volume

The Wisconsin Rules of Evidence: A Courtroom Handbook

11th Edition

*Includes 2024–25 Supplement

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STATE BAR OF WISCONSIN

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This book is presented with the understanding that the publisher does not render any legal, accounting, or other professional service. Due to the rapidly changing nature of the law, information contained in this publication may become outdated. As a result, anyone using this material must always research original sources of authority and update this information to ensure accuracy when dealing with a specific client’s legal matters. In no event will the author, the reviewers, or the State Bar of Wisconsin be liable for any direct, indirect, or consequential damages resulting from the use of this material.

Summary of Developments

New Developments Reported in the 2024–25 Supplement

The 2024–25 supplement *to The Wisconsin Rules of Evidence: A Courtroom Handbook* adds citations and annotations for significant evidence-law cases decided by the Wisconsin Supreme Court and Court of Appeals and the U.S. Supreme Court since publication of the 2023–24 revision, including the following:

In a 2024 opinion, the Wisconsin Court of Appeals discussed the relevance of certain evidence presented in a lawsuit alleging mesothelioma caused by workplace exposure to asbestos. *See* chs. 7, 9.

In a 2024 opinion, reviewing a defendant’s convictions on drug-related charges, the U.S. Supreme Court considered whether a trial court had properly admitted an absent lab analyst’s statements that supported a testifying expert’s opinion at trial. *See* ch. 24, app. A.

The Wisconsin Court of Appeals, in a 2023 opinion, discussed the applicability of the Wis. Stat. § 908.03(3) hearsay exception (for a then-existing state of mind) to statements by a decedent regarding bank accounts held jointly with one of the decedent’s children. *See* ch. 26.

The Wisconsin Court of Appeals, in a 2023 opinion, considered whether a child’s statements to health-care providers in an emergency room after an alleged sexual assault were testimonial statements that implicated the Confrontation Clause. *See* app. A.

The 2024–25 supplement also features updates to the text of the Wisconsin Rules of Evidence, which are reprinted in the book. Among the developments are the Wisconsin Legislature’s creation of a new testimonial privilege for communications made by public safety professionals (e.g., police officers and fire fighters) as part of peer support services from a peer support team member or as part of critical incident stress management services. The legislature also added a new subsection to the attorney-client privilege rule, clarifying the privilege when the client is a fiduciary, and amended certain definitions in the rule governing the health-care-provider-patient privilege as part of Wisconsin’s ratification of the Counseling Compact. The table below indicates which specific sections of the Wisconsin Rules of Evidence have been affected by recent legislation:

Section	Treatment	Affected by
905.03(2m)	created	2023 Wis. Act 127
905.04((1)(bm), (dm), (g)	amended	2023 Wis. Act 55
905.095	created	2023 Wis. Act 220

In addition, the Wisconsin Legislature amended Wis. Stat. § 972.11 to expand the circumstances in which a court may order that the testimony of a child witness in a criminal trial be taken in a room other than the courtroom and simultaneously televised in the courtroom by means of closed-circuit audiovisual equipment. *See* app. C.

Developments Previously Reported in the 2023–24 Revision

The 2023–24 revision of *The Wisconsin Rules of Evidence: A Courtroom Handbook* added citations and annotations for significant evidence-law cases decided by the Wisconsin Supreme Court and Court of Appeals and the U.S. Supreme Court since publication of the 2022–23 supplement, including the following:

In a products-liability case in 2022, the Wisconsin Court of Appeals reviewed evidentiary rulings that concerned various matters, such as presumptions, *see* ch. 5, relevance, *see* ch. 7, prejudice, *see* ch. 8, subsequent remedial measures, *see* ch. 10, and expert opinions, *see* ch. 24.

In a 2023 appeal from a conviction for repeated sexual assault of a child, the Wisconsin Court of Appeals addressed assertions of ineffective assistance of counsel relating to defense counsel's failure to object to certain evidence on grounds of relevance, *see* ch. 8, or to object to testimony regarding witnesses' truthfulness, *see* ch. 24, and evidence concerning the victim's use of birth control, *see* app. C.

The Wisconsin Supreme Court, in a 2023 decision, considered the potential applicability of an exception to the evidentiary rule otherwise barring the admission of settlement evidence. *See* ch. 10.

The Wisconsin Supreme Court, in 2023, considered whether it should overrule prior cases that had permitted criminal defendants to seek *in camera* review of a victim's privately held, privileged health-care records. *See* ch. 14. Related annotations in the *Evidence Handbook* for earlier cases affected by this decision have been updated accordingly. *See* chs. 14, 17, 22.

The Wisconsin Supreme Court, in a 2022 opinion, in addressing a challenge to an allegedly deficient affidavit, discussed whether particular language or procedures are required for a sufficient oath. *See* ch. 18.

The Wisconsin Supreme Court, in 2023, reviewed whether a circuit court had properly admitted testimony about DNA evidence contained in a crime lab report not in evidence, when the defendant did not have an opportunity to cross-examine the report's author. *See* ch. 24, app. A.

In a 2023 opinion, the U.S. Supreme Court discussed the circumstances under which the prosecution can introduce a nontestifying codefendant's confession without violating the Confrontation Clause. *See* app. A.

In addition to the above cases, the 2023–24 revision includes a new reference to a 2022 decision in which the U.S. Court of Appeals for the Seventh Circuit considered whether a sex-trafficking coconspirator's statements, recorded on police body cameras, were testimonial hearsay barred by the Confrontation Clause. *See* app. A.

IN MEMORIAM

THOMAS D. BELL
January 2, 1946—May 26, 1996

The real creator of this book was Tom Bell. While he was serving on the State Bar Post Graduate Education Committee, he conceived the idea of a courtroom handbook on evidence in which particular rules of evidence together with their related cases could be quickly accessed under stress by means of a topical guide placed in the center of the book and a tab system. He had seen such a book in use in another state where he had gone for a trial. He secured the support of the Committee and the Director of ATS. Because I had served on the 1974 Code of Evidence Drafting Committee and we had worked together on CLE evidence seminars in the past, he asked me to join him as his collaborator. It was an intriguing challenge. I quickly accepted and off we went at full steam.

With Tom Bell nothing was done halfway. He worked with great intensity and enthusiasm. His scholarship was impeccable. His mind was exceptionally quick. He was a warm person with whom you could be very candid and he in turn had no hidden agendas. It was a wonderful and stimulating collaboration. We each brought very different views into our work, but we never had any serious disagreements. He was quick to accede and persuasive in his ability to present ideas.

Tom was not a grind. He loved a good time. He was always bubbling with ideas. He had a very strong sense of social responsibility—not only in his extensive work with his local bar and the State Bar, but he gave much of himself in serving others. I know of at least two occasions when he gave two weeks at a time of his labor in Central America and the South Pacific, helping to build schools, churches, and hospitals. He was also very devoted to his family.

Keeping in good physical shape was important to Tom. Thus it was a terrible shock to all of us who knew and loved him that he succumbed to a massive heart attack when taking a bicycle ride with family and friends in his hometown in Iowa in preparation for a bike race. He leaves an irreplaceable loss in the hearts of us all.

—Thomas H. Barland
April 11, 1997

DEDICATION

The original authors of this handbook were Thomas H. Barland, circuit judge for Eau Claire County, and Thomas D. Bell, an attorney in New Richmond, Wisconsin. They began their collaboration in 1975.

After work for the 2014–15 supplement to the *Evidence Handbook* was completed, Judge Barland announced his decision to retire. At age 84 and after decades of contributing to the *Handbook*, he certainly earned that.

It is difficult to imagine Judge Barland not being involved in this publication. While the idea for the book came from Tom Bell, Judge Barland was an enthusiastic partner from the beginning. The two Toms resolved to prepare this collection of annotations and provide their efforts free of charge to the State Bar because of their dedication to the legal profession and belief in the importance of our State Bar as a clearinghouse of ideas for all the attorneys practicing in Wisconsin.

At its inception, this book would likely have received scant recognition if a respected trial judge were not a contributing author. Tom Bell believed there was one trial judge in northwestern Wisconsin who was particularly well suited—Judge Thomas Barland.

Judge Barland's reputation for civility, scholarship, and thoughtfulness on the bench carried over into his work on this book.

Judge Barland's future contributions to this book will be missed. Ever the hard worker, his guiding hand is on every page.

—Michael J. Brose
November 19, 2014

Foreword

For 41 years, *The Wisconsin Rules of Evidence: A Courtroom Handbook* has provided Wisconsin lawyers with a convenient courtroom guide to the rules of evidence and the cases interpreting them.

This popular handbook owes its original existence to the dedicated efforts of Judge Thomas H. Barland and Attorney Thomas D. Bell, who devoted innumerable hours to developing the original book, published in 1982. Through four revised editions, until Tom Bell's untimely death in 1996, these authors donated their time each year—updating the book by reviewing new cases, drafting annotations, and adding authors' comments.

Attorney Michael J. Brose, who first joined the project by assisting Tom Bell, continued to build on the handbook's well-laid foundation after 1996 by writing regular updates along with Judge Barland, whose dedicated contributions continued through the 2014–15 supplement. On a periodic basis between the book's 5th and 6th editions, former judge Susan Steingass also participated in the project by revising individual chapters. Attorney Liesl Nelson joined the handbook as a new coauthor as of the 2015–16 supplement, and Judge John Markson enthusiastically volunteered to offer his judicial perspective to the project as of the 9th edition in 2017. When Attorney Brose decided to step down as an active coauthor in 2021, Attorney Mackenzie Campbell graciously agreed to become the book's newest contributor. For this year's 11th edition, the three current authors have drafted new annotations and, where appropriate, revised (or eliminated) the book's existing annotations.

On behalf of the State Bar of Wisconsin, we express our deepest appreciation to the authors—past and present—for their collaborative efforts to produce this unique resource. We also acknowledge some of the State Bar staff members whose efforts contributed to this revised edition: attorney-editor Hana Miura and book production coordinator Jackie Johnson, who together managed the book throughout the revision process.

Carol A. Chapman, Esq.
Publications Manager
State Bar of Wisconsin

About the Authors

Mackenzie E. Campbell is a partner at Doar Drill & Skow, S.C., and concentrates on civil litigation with an emphasis on personal-injury and real estate claims. Ms. Campbell graduated from the University of Minnesota Twin Cities and earned her law degree (cum laude) from William Mitchell College of Law, now Mitchell Hamline School of Law.

John W. Markson served as a circuit court judge for Dane County from 2007 until his retirement in 2017. He worked in both the civil and criminal divisions. He was named 2016 trial judge of the year by the Wisconsin chapter of the American Board of Trial Advocates (ABOTA). He was an associate dean of the Wisconsin Judicial College for three years. Before taking the bench, he was a trial lawyer for 28 years. He is a fellow in the American College of Trial Lawyers and was a member of ABOTA.

Liesl Nelson is an assistant public defender with the Hudson Trial Office of the Wisconsin State Public Defender. She received a B.A. from Washington University in 1992 and her J.D. from the University of Wisconsin Law School in 1996.

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About the Supplement Author

David H. Perlman is a Judicial Education Specialist for the Wisconsin Office of Judicial Education. Dave's responsibilities include coordinating and presenting at various training conferences for the judiciary, drafting synopses of court decisions for circuit judges, and hosting a video series for judges called "Legal Shorts." Before joining the Wisconsin Office of Judicial Education, Dave was an Assistant Attorney General with the Wisconsin Department of Justice for 28 years. His areas of expertise included constitutional law, particularly search and seizure issues. In addition, Dave was an appellate lawyer with the department and argued many Fourth and Fifth Amendment cases to the Wisconsin Supreme Court. An honors graduate of Northwestern University, Dave received his law degree from the Indiana University Law School.

How to Use This Book

The *Wisconsin Rules of Evidence: A Courtroom Handbook* provides a quick and easy reference to the Wisconsin Rules of Evidence. It is designed to help trial lawyers and judges, during trial, quickly find the applicable rules of evidence, commentary on those rules, and the relevant case law. It is not intended to be and should not be used as a definitive treatise on evidence.

The handbook's format is designed for trial use. The book provides the full text of each **Rule of Evidence**, followed by the applicable **Judicial Council Committee's Note. Case Annotations** are included next. The cases are arranged in reverse chronological order with the most recent case listed first. Only those cases that the authors deem significant in terms of interpretation or factual characteristics have been included. **Authors' Notes**, highlighting particular evidentiary issues and related statutes, are also included.

One of the most important features of the print version of this handbook is its center **Topical Guide**. This Topical Guide, which keys evidence topics to the numbered side tabs, is designed to enable the user to locate the applicable evidence rule with great speed. In trial, the handbook should remain open to the Topical Guide for quick reference. In addition to these numbered side tabs, the 1992 revised edition added a new feature—top tabs that identify the major subject headings of the Wisconsin Rules of Evidence. These tabs were added in response to user requests and have been retained in the current edition.

As part of their ongoing review of the book's annotations for each revision, the authors eliminate obsolete cases and summarize still viable but non-landmark cases in a terse parenthetical phrase. Chapters containing these specially condensed cases collect the references under a "***See also*** …." heading after the final primary annotations for each section or subsection. We believe this feature will be helpful to readers who are looking for a case on point factually.

The handbook also contains three appendices, recognizing a few important evidentiary matters that might arise outside the Wisconsin Rules of Evidence. Appendix A (*Crawford* and the Right to Confrontation) analyzes the key U.S. Supreme Court and Wisconsin appellate court cases that are part of the evolving line of Confrontation Clause decisions—starting with *Crawford v. Washington*, 541 U.S. 36 (2004)—which have addressed the admissibility of out-of-court statements made by witnesses not available at trial. Appendix B provides an extended practice note on the topic of depositions at trial. Appendix C (Criminal Trials) follows the format of the main chapters in the handbook by reprinting the text of the pertinent statutes (in this instance, the criminal trial rules found in Wis. Stat. §§ 972.11 and 972.115) and provides author-drafted annotations of the most significant case law interpreting those rules.

Finally, the book contains a **Table of Cases** and an **Index**. The Table of Cases at the back of the print book includes all annotated cases as well as cases mentioned within annotations and the Authors' Notes. The Index refers to the statutes by subject. The Index also provides references to the book's appendices.

Table of Contents

Chapter 1
Scope and Purpose

901.01 Scope.
Chapters 901 to 911 govern proceedings in the courts of the state of Wisconsin except as provided in ss. 911.01 and 972.11.

Judicial Council Committee's Note (1974)

Chapters 901 to 911 apply to courts of record and municipal courts. S. 300.07 is amended to be consistent with this section.

Case Annotations

AllEnergy Corp. v. Trempealeau Cnty. Env't & Land Use Comm., 2017 WI 52, ¶¶ 77–86, 375 Wis. 2d 329, 895 N.W.2d 368.
The Wisconsin Rules of Evidence govern court proceedings, not administrative proceedings.

901.02 Purpose and construction.

Chapters 901 to 911 shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Judicial Council Committee's Note (1974)

For similar provisions see s. 262.01. This section and s. 904.03 should be read in connection with every provision in this title to afford life and growth to the law of evidence.

Case Annotations

State v. Manuel, 2005 WI 75, ¶ 59, 281 Wis. 2d 554, 697 N.W.2d 811.

The evidence rules must be construed under Wis. Stat. § 901.02 to "secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." The supreme court concluded, however, that it is unwise to establish a blanket rule that "blindly" trusts the hearsay rules to safeguard constitutional rights. Evidence that may be admissible under the hearsay rules may be inadmissible under the Confrontation Clause. *See Crawford v. Washington*, 541 U.S. 36 (2004).

Chapter 2
Making Record of Objections

901.03 Rulings on evidence.

(1) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and

(a) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(b) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

(2) Record of offer and ruling. The judge may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The judge may direct the making of an offer in question and answer form.

(3) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(4) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge.

Judicial Council Committee's Note (1974)

Sub. (1). This subsection is consistent with the oft-stated "Harmless Error" rule. 2 West, Wisconsin Key Number Digest 466 et seq. (1964); see also ss. 269.43, 274.37, and 968.22. In *Wold v. State*, 57 Wis. 2d 344, 356, 204 N.W.2d 482 (1973), the court said: "The test of harmless error is not whether some harm has resulted, but, rather, whether the appellate court in its independent determination can conclude there is sufficient

evidence, other than and uninfluenced by the inadmissible evidence, which would convict the defendant beyond a reasonable doubt. *See Harrington v. California* (1969), 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284. Although the court in *Fahy v. State of Connecticut* (1963), 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171, had talked about reasonable possibilities, *Harrington* shows the court no longer in fact uses that standard. A possibility test is the next thing to automatic reversal. In determining guilt 'beyond a reasonable doubt' the human mind should not work on possibilities but on reasonable probabilities."

Specificity of objection, *Schueler v. City of Madison*, 49 Wis. 2d 695, 183 N.W.2d 116 (1971); *Wilder v. Classified Risk Ins. Co.*, 47 Wis. 2d 109, 177 N.W.2d 109 (1970); *Collier v. State*, 30 Wis. 2d 101, 140 N.W.2d 252 (1966); 20 West, Wisconsin Key Number Digest, 404 (1964), and specificity of timely motion to strike, *Huse v. Milwaukee County Expressway Comm'n*, 16 Wis. 2d 225, 114 N.W.2d 429 (1962), has long been the Wisconsin rule, except where the specific ground is self-evident. Similarly, an offer of proof is necessary to preserve an error of exclusion, *State v. Moffett*, 46 Wis. 2d 164, 174 N.W.2d 263 (1970); *Hales Corners Sav. & Loan Ass'n v. Kohlmetz*, 36 Wis. 2d 627, 154 N.W.2d 329 (1967); *Rausch v. Buisse*, 33 Wis. 2d 154, 146 N.W.2d 801 (1966), unless the prejudicial effect of the exclusion is self-evident, *Fullerton Lumber Co. v. Korth*, 23 Wis. 2d 253, 127 N.W.2d 1 (1964), or the excluded evidence is clearly not admissible, *State ex rel. Schlehlein v. Duris*, 54 Wis. 2d 34, 39, 194 N.W.2d 613, 616 (1972). The purpose of objections to question on the examination of a witness is not solely to enable the objecting party to insist on error in the appellate court, but is in the part to enable the counsel who is conducting the examination to avoid error and more effectually prove his case or defense. *Colburn v. Chicago, St. P., M. & O.R. Co.*, 109 Wis. 377, 85 N.W. 354 (1901).

Sub. (2). Wisconsin authorizes the trial judge to direct that an offer of proof be in question and answer form. *Johann v. Milwaukee Electric Tool Corp.*, 270 Wis. 573, 72 N.W.2d 401 (1955), *certiorari denied* 76 S.Ct. 411, 351 U.S. 918, 100 L.Ed. 1450, and the proscription of "commenting on the evidence" does not prohibit comment on evidence by the trial judge in the jury's presence in the course of explaining his ruling on evidence, *State v. Rice*, 38 Wis. 2d 344, 156 N.W.2d 409 (1968); nor is it commenting on the evidence to supplement the record for the purpose of: explaining a ruling, *Bowers v. State*, 53 Wis. 2d 441, 192 N.W.2d 861 (1972), granting a mistrial, or excluding otherwise admissible evidence because of substantial danger of undue prejudice, *Underwood v. Strasser*, 48 Wis. 2d 568, 180 N.W.2d 631 (1970), or supplementing statements of counsel in record claimed misconduct of a trial judge, *Breunig v. American Family Ins. Co.*, 45 Wis. 2d 536, 173 N.W.2d 619 (1970). Contemporaneity of the supplementary statement is desirable if it is to be persuasive, *Underwood v. Strasser*, *supra*.

Sub. (3). This practice is endorsed in *Johann v. Milwaukee Electric Tool Corp.*, 270 Wis. 573, 72 N.W.2d 401 (1955), *certiorari denied* 76 S.Ct. 711, 351 U.S. 918, 100 L.Ed. 1450, and its application supported in the Uniform Rule of Court adopted by the Wisconsin Board of Circuit Judges in 1964, and s. 971.31(3). Also see Note, *Pretrial Exclusionary Evidence Rulings*, 1967 Wis. L. Rev. 738.

Sub. (4). This rule is consistent with s. 251.09.

Case Annotations

(1) Effect of Erroneous Ruling

State v. Hunt, 2014 WI 102, ¶¶ 26, 28–36, 360 Wis. 2d 576, 851 N.W.2d 434.

The erroneous exclusion of testimony is subject to the harmless-error rule. Harmless-error analysis determines whether the error was consequential to the verdict. For the error to be deemed harmless, the party that benefited from the error must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict.

In a criminal case in which the ultimate issue turned on the victim's credibility versus the defendant's credibility, although the circuit court erroneously excluded testimony that would have corroborated the defendant's theory of the case, the supreme court determined that the error was harmless; it did not affect the jury's verdict and therefore was not reversible.

Weborg v. Jenny, 2012 WI 67, ¶¶ 68–69, 341 Wis. 2d 668, 816 N.W.2d 191.

The improper admission of evidence is not grounds for reversing a judgment or granting a new trial unless the error affected the substantial rights of the party. In this medical malpractice action, while it was error to admit evidence of collateral source payments, that did not affect the substantial rights of the party because, ultimately, the jury was not asked to decide damages.

State v. Smith, 2002 WI App 118, ¶ 20, 254 Wis. 2d 654, 648 N.W.2d 15.

In a trial for second-degree sexual assault of a child, party to a crime, it was harmless error for the court to exclude admissible testimony that would illustrate prior inconsistent statements of the victim when the discrepancies between the victim's prior statements and trial testimony were minor compared with the overall consistency of each of the victim's accounts of the traumatic experience.

Martindale v. Ripp, 2001 WI 113, ¶ 31, 246 Wis. 2d 67, 629 N.W.2d 698.

In determining whether a new trial will be granted for error that has affected the substantial rights of the parties, Wis. Stat. § 901.03 must be read with Wis. Stat. § 805.18(2) ("Mistakes and omissions; harmless error").

Ansani v. Cascade Mountain, Inc., 223 Wis. 2d 39, 51–52, 588 N.W.2d 321 (Ct. App. 1998).

Learned treatise evidence improperly admitted does not adversely affect a substantial right of the party if the evidence is cumulative and the treatise was not given to the jury.

(a) Objection

State v. Mercado, 2021 WI 2, ¶ 34, 395 Wis. 2d 296, 953 N.W.2d 337.

The defendant forfeited several objections to the admission of video-recorded statements of three children by not raising the objections during trial or on appeal.

State v. English-Lancaster, 2002 WI App 74, ¶ 17, 252 Wis. 2d 388, 642 N.W.2d 627.

The contemporaneous objection rule does not bar a party from raising an evidentiary issue on appeal when the party waited to object until the jury was next excused in order to avoid drawing the jury's attention to the prejudicial evidence.

Estate of Neumann v. Neumann, 2001 WI App 61, ¶ 26, 242 Wis. 2d 205, 626 N.W.2d 821.

Objections made at trial based on the form of questions are insufficient to preserve for appeal a challenge to a witness's qualifications to give an expert opinion.

State v. Agnello, 226 Wis. 2d 164, 172–76, 593 N.W.2d 427 (1999).

In a *Goodchild* hearing, an objection of "relevance," when the basis for objection was that "the truthfulness of a confession has no bearing on voluntariness," was sufficiently specific to have alerted the court to the objection. *See State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

State v. Barnes, 203 Wis. 2d 132, 140, 552 N.W.2d 857 (Ct. App. 1996).

If an attorney fails to object at the trial court level with exactitude, making it impossible to ascertain precisely what questions counsel found objectionable, evidentiary objections might be waived for purposes of appeal.

State v. Bustamante, 201 Wis. 2d 562, 571–73, 549 N.W.2d 746 (Ct. App. 1996).

When a court has granted a motion in limine to admit evidence, and the defendant opposes that motion, the defendant need not also object to the evidence at trial to preserve the right to appeal the issue raised by the motion. However, the defendant is limited to making the same arguments on appeal that were made at the pretrial suppression hearing. Furthermore, if the evidence presented at trial differs from that which was contemplated in the motion in limine, a defendant must call attention to this contention at trial in order to preserve this argument for appeal.

State v. Munoz, 200 Wis. 2d 391, 402–03, 546 N.W.2d 570 (Ct. App. 1996).

Sidebar conferences should be on the record whenever possible. If they are not, it is essential that comments be repeated or summarized on the record and confirm exactly what was presented to the trial court at the time of its ruling.

Wingad v. John Deere & Co., 187 Wis. 2d 441, 456, 523 N.W.2d 274 (Ct. App. 1994).

To preserve an issue for appeal, objections must be made before the jury verdict is returned.

Johnson v. Agoncillo, 183 Wis. 2d 143, 155 n.4, 515 N.W.2d 508 (Ct. App. 1994).

Only the questioner can assert the objection that an answer is not responsive. Any admissible statement by the witness, albeit "nonresponsive," could be elicited by the next question. Accordingly, the opponent's objection to the statement should raise the substantive evidentiary infirmity.

State v. Peters, 166 Wis. 2d 168, 174–75, 479 N.W.2d 198 (Ct. App. 1991).

In preserving a hearsay objection for appeal, the objector's burden is satisfied by objecting to proffered testimony as "hearsay." The objector need not point out the missing element in an exception to the hearsay rule. "Lack of personal knowledge" is another way of asserting a hearsay objection and is sufficiently specific to reasonably advise the court of the basis for the objection.

State v. Bergeron, 162 Wis. 2d 521, 528–29, 470 N.W.2d 322 (Ct. App. 1991).

When a court has denied a motion in limine to suppress evidence, the defendant need not also object at trial to preserve the right to appeal on the issue raised by the motion. The issue raised on appeal must not be different in fact or law from that presented by the motion in limine.

Farrell v. John Deere Co., 151 Wis. 2d 45, 71–72, 443 N.W.2d 50 (Ct. App. 1989).

The defendant company waived its right to complain that an expert did not testify to a reasonable degree of probability when it framed its objection in terms of competency as opposed to the form of the question. An objection to evidence must inform the trial court of the specific grounds on which the objection is based.

State v. Sonnenberg, 117 Wis. 2d 159, 176–77, 344 N.W.2d 95 (1984).
The failure to make a timely and proper objection precludes review of admitted evidence as a matter of right, unless the admission of the evidence was plain error—error so obvious and substantial that a new trial must be granted.

State v. Wedgeworth, 100 Wis. 2d 514, 528, 302 N.W.2d 810 (1981).
The practice of reserving the right to state the grounds of objection at a later time is expressly disapproved. Objections must be prompt and state the exact grounds on which they are based. Attorneys who rely on unrecorded sidebar conferences do so at their peril.

Vanlue v. State, 87 Wis. 2d 455, 462, 275 N.W.2d 115 (Ct. App. 1978), *rev'd on other grounds*, 96 Wis. 2d 81, 291 N.W.2d 467 (1980).
If counsel has objected to evidence of other crimes and the objection is overruled, counsel does not waive the objection by bringing the material out personally. To put the evidence in personally or let the state put it in is no election at all.

McClelland v. State, 84 Wis. 2d 145, 157–58, 267 N.W.2d 843 (1978).
The trial court is only obligated to rule on the objection made. Even if the evidence is properly excludable on other grounds, if such grounds are not raised, the trial court need not consider them.

(b) Offer of Proof

State v. Winters, 2009 WI App 48, ¶¶ 14–24, 317 Wis. 2d 401, 766 N.W.2d 754.
A party challenging a court's ruling excluding evidence must make an offer of proof. The obligation to make the offer of proof is on the party proffering the evidence, not the trial court.

State v. Brown, 2003 WI App 34, ¶¶ 7, 19–20, 260 Wis. 2d 125, 659 N.W.2d 110.
In this criminal case, the defendant did not provide an adequate offer of proof to allow the court to conclude that the defendant's proposed testimony was not an alibi requiring notice. The trial court thus properly excluded the testimony as inadequately noticed alibi evidence.

State v. Dodson, 219 Wis. 2d 65, 76, 580 N.W.2d 181 (1998).
Offers of proof can be made in question-and-answer form or by statement of counsel. However, trial courts are encouraged to use the question-and-answer format in a close case so that the trial and appellate courts will have a better basis to determine whether there is a sustainable evidentiary hypothesis.

State v. Darcy N.K., 218 Wis. 2d 640, 659–60, 581 N.W.2d 567 (Ct. App. 1998).
The defendant waived a claim of error attributed to defense counsel's failure to make an offer of proof as to what the attorney wished to establish with follow-up questions when the trial court denied defense counsel's request to follow up on questions that the jury had asked the witnesses at trial.

State v. Williams, 198 Wis. 2d 516, 538, 544 N.W.2d 406 (1996).
When a claim of error is made based on the exclusion of evidence, an offer of proof must be made to the trial court as a condition precedent to the review of the alleged error. When a party makes no offer of proof as to the contents of notes, and the record otherwise contains no indication of the nature of a witness's allegedly inconsistent statements in those notes, the appellate courts will not reach the merits of the claim of erroneous exclusion.

State v. Robinson, 146 Wis. 2d 315, 329, 431 N.W.2d 165 (1988).
In a prosecution for first-degree sexual assault, evidence of the victim's pregnancy and her desire to have an abortion were properly excluded, because the defendant's offer of proof did not state an evidentiary hypothesis underpinned by a sufficient statement of facts to enable the court to conclude with reasonable confidence that the evidentiary hypothesis could be sustained.

(2) Record of Offer and Ruling

(3) Hearing of Jury

(4) Plain Error

State v. Zdzieblowski, 2014 WI App 130, ¶¶ 8, 19–23, 30, 359 Wis. 2d 102, 857 N.W.2d 622.

It is inadvisable but not plain error for a prosecutor to elicit from prospective jurors a promise to convict if the elements of the crime are established beyond a reasonable doubt. Even if the prosecutor's questions were in error in this case, they constituted only harmless error. A court's harmless-error analysis does not consider jury nullification.

State v. Miller, 2012 WI App 68, ¶¶ 17–23, 341 Wis. 2d 737, 816 N.W.2d 331.

The plain-error rule allows appellate courts to review errors that were otherwise forfeited by a party's failure to object. The error must be obvious and substantial. The test is whether the statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

Here, because the prosecutor's comments that the defendant was a liar were properly tied to the evidence and because the trial court properly instructed the jury, those comments did not constitute plain error.

State v. Lammers, 2009 WI App 136, ¶¶ 22–24, 321 Wis. 2d 376, 773 N.W.2d 463.

While attorneys cannot vouch for the credibility of a witness in argument, a prosecutor's colloquial use of the phrase "I believe" in regard to the credibility of a witness was sufficiently tied to the evidence so as to not rise to the level of fundamental error.

State v. Jorgensen, 2008 WI 60, ¶¶ 21–23, 310 Wis. 2d 138, 754 N.W.2d 77.

The plain-error rule allows review of errors that were otherwise waived by a party's failure to object. Procedurally, the party raising the rule must show that the unobjected-to error is fundamental, obvious, and substantial. If so, the burden shifts to the opposition to show the error was harmless. In the context of a criminal case, to determine whether an error is harmless, the court inquires whether the state can prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. If the state fails to meet that burden, the court can conclude that the error constitutes plain error. In determining whether an error is harmless, the court can consider the following factors: (1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; (4) whether the erroneously admitted evidence duplicates untainted evidence; (5) the nature of the defense; (6) the nature of the state's case; and (7) the overall strength of the state's case.

State v. Mayo, 2007 WI 78, ¶¶ 29, 43, 301 Wis. 2d 642, 734 N.W.2d 115.

A party's failure during trial to object to improper prosecutorial argument is not plain error unless it so infects the trial with unfairness as to constitute a denial of due process.

State v. Frank, 2002 WI App 31, ¶¶ 23–25, 250 Wis. 2d 95, 640 N.W.2d 198.

Admission of statements argued to have been taken during the course of a polygraph examination was not plain error when the record did not reveal the circumstances under which the statements were made and no basic constitutional right was implicated.

State v. Street, 202 Wis. 2d 533, 552, 551 N.W.2d 830 (Ct. App. 1996).

A party's failure during trial to object to a claimed error affecting substantial rights will not preclude that party from obtaining review of the error on appeal. However, the error must be obvious, substantial, or grave, and so fundamental that a new trial or other relief must be granted. In this case, the portion of the state's closing argument that allegedly portrayed the defendant and defense counsel as attempting to manipulate the judicial system did not constitute plain error; the defendant was thus not entitled to appellate review of the alleged error, to which the defendant had failed to object in the trial court.

Virgil v. State, 84 Wis. 2d 166, 191, 193 n.4, 267 N.W.2d 852 (1978).

In determining whether error is plain or harmless, other evidence properly admitted is relevant. Erroneously admitted evidence might tip the scales in close cases, even though the same evidence would be harmless in a case with overwhelming evidence of guilt. The plain-error rule is particularly appropriate when there is a mismatch between counsel, in order to prevent one side from taking advantage.

Chapter 3
Preliminary Considerations

901.04 Preliminary questions.

(1) QUESTIONS OF ADMISSIBILITY GENERALLY. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to sub. (2) and ss. 971.31(11) and

972.11(2). In making the determination the judge is bound by the rules of evidence only with respect to privileges and as provided in s. 901.05.

(2) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(3) Hearing out of the presence of a jury. Hearings on any of the following shall be conducted out of the presence of the jury:

(a) Admissibility of confessions.

(b) In actions under s. 940.22, admissibility of evidence of the patient's or client's personal or medical history.

(c) In actions under s. 940.225, 948.02, 948.025, 948.051, 948.085, or 948.095, or under s. 940.302(2), if the court determines that the offense was sexually motivated, as defined in s. 980.01(5), admissibility of the prior sexual conduct or reputation of a complaining witness.

(cm) Admissibility of evidence specified in s. 972.11(2)(d).

(d) Any preliminary matter if the interests of justice so requires.

(4) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself or herself to cross-examination as to other issues in the case.

(5) Weight and credibility. This section does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Judicial Council Committee's Note (1974)

Sub. (1). This subsection is consistent with Wisconsin decisions that the trial judge determines: a witness's qualification, *Collier v. State*, 30 Wis. 2d 101, 140 N.W.2d 252 (1966); *State v. Schweider*, 5 Wis. 2d 627, 94 N.W.2d 154 (1959); *Jacobson v. Greyhound Corp.*, 29 Wis. 2d 55, 138 N.W.2d 133 (1965); existence of a privilege, *Stelloh v. Liban*, 21 Wis. 2d 119, 124 N.W.2d 101 (1963); *Abraham v. State*, 47 Wis. 2d 44, 176 N.W.2d 349 (1970); *State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis. 2d 559, 592, 150 N.W.2d 387, 405 (1967), 35 A.L.R.3d 377; and the admissibility of a confession, *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965), *certiorari denied* 86 S.Ct. 1941, 384 U.S. 1017, 16 L.Ed.2d 1039. See J. Wigmore, *Evidence* s. 2550 (3d ed. 1940) [hereinafter cited as Wigmore]. Exoneration of the trial judge from the rules of evidence in making his determination has not been articulated in Wisconsin decisions, but s. 262.17(1)(b) provides for proof of service by affidavit and ss. 269.32, 269.45, 270.50, and 270.635 permit rulings on motions based upon affidavits. The second sentence deviates from the federal rule only in the interest of clarity; no change of substance is intended.

Sub. (2). This section is consistent with the Wisconsin manner of handling conditional relevancy. *Huse v. Milwaukee County Expressway Comm'n*, 16 Wis. 2d 225, 114 N.W.2d 429 (1962).

Sub. (3). This subsection is consistent with Wisconsin practice, *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965), *certiorari denied* 86 S.Ct. 1941, 384 U.S. 1017, 16 L.Ed.2d 1039; *State v. McGee*, 52 Wis. 2d 736, 190 N.W.2d 893 (1971); *State v. Brown*, 50 Wis. 2d 565, 185 N.W.2d 323 (1971). Also see s. 971.31(3).

Sub. (4). Wisconsin limits cross-examination when the accused testifies upon a preliminary matter, *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965), *certiorari denied* 86 S.Ct. 1941, 384 U.S. 1017, 16 L.Ed.2d 1039; however such a limitation does not preclude use of such testimony for impeachment purposes if the defendant's subsequent testimony is inconsistent, *Ameen v. State*, 51 Wis. 2d 175, 186 N.W.2d 206 (1971).

Sub. (5). Wisconsin recognizes the jury's function in weighing and determining the credibility of testimony with respect to questions of preliminary admissibility already determined in favor of admissibility by the judge. *Collier v. State*, 30 Wis. 2d 101, 140 N.W.2d 252 (1965).

Case Annotations

(1) Questions of Admissibility Generally

Seifert v. Balink, 2017 WI 2, ¶ 58, 372 Wis. 2d 525, 888 N.W.2d 816.

When considering whether expert testimony is admissible under Wis. Stat. § 907.02, the circuit court must be satisfied by a preponderance of the evidence that the testimony is reliable.

State v. Zamzow, 2016 WI App 7, ¶ 9 & n.2, 366 Wis. 2d 562, 874 N.W.2d 328, *aff'd*, 2017 WI 29, ¶ 24, 374 Wis. 2d 220, 892 N.W.2d 637.

The Confrontation Clause does not apply at pretrial hearings, including hearings on suppression motions.

Parker v. Wisconsin Patients Comp. Fund, 2009 WI App 42, ¶¶ 28–29, 317 Wis. 2d 460, 767 N.W.2d 272.

Whether a witness is qualified to provide expert testimony is a preliminary question of fact for the judge. In this medical malpractice action, the trial court acted within its discretion in excluding an expert's testimony by deposition, when the deposition contained no discussion of the expert's training or specific expertise and the proffered witness's curriculum vitae was not made part of the deposition record.

State v. Jiles, 2003 WI 66, ¶¶ 25–30, 262 Wis. 2d 457, 663 N.W.2d 798.

At a suppression hearing, including a *Miranda-Goodchild* hearing, the rules of evidence, except for privilege and Wis. Stat. § 901.05, need not be applied. The court may rely on hearsay and other evidence that would not be admissible at trial.

State v. Santana-Lopez, 2000 WI App 122, ¶¶ 4–7, 237 Wis. 2d 332, 613 N.W.2d 918.

A defendant's offer to undergo DNA testing may be relevant as reflecting consciousness of innocence if the person making the offer believes the test is possible, accurate, and admissible. The trial court erred in rejecting evidence of the offer without first making a determination of conditional relevance under Wis. Stat. § 901.04(1) and then, if the court determined the defendant believed DNA could detect the sexual assaults of which he was charged, exercising discretion under Wis. Stat. § 904.03 to decide whether the relevance of that evidence is substantially outweighed by the factors set forth in that rule.

State v. Cardenas-Hernandez, 214 Wis. 2d 71, 88, 571 N.W.2d 406 (Ct. App. 1997), *aff'd*, 219 Wis. 2d 516, 534–35, 579 N.W.2d 678 (1998).

When the relevancy of a fact depends on a foundation, the court determines whether the proponent has presented evidence sufficient to establish that foundation.

State v. Whitaker, 167 Wis. 2d 247, 262, 481 N.W.2d 649 (Ct. App. 1992).

The trial court may consider an out-of-court declaration by a party's alleged co-conspirator in determining whether there was a conspiracy.

State v. Frambs, 157 Wis. 2d 700, 704–06, 460 N.W.2d 811 (Ct. App. 1990).

The right to confront witnesses as provided by the Sixth Amendment to the U.S. Constitution does not graft additional constitutional requirements to this section to prevent hearsay statements in a hearing under this section. The court may rely on hearsay in making a determination. The burden-of-proof standard is the preponderance of the evidence.

(2) Relevancy Conditioned on Fact

Horak v. Building Servs. Indus. Sales Co., 2012 WI App 54, ¶¶ 12–15, 341 Wis. 2d 403, 815 N.W.2d 400.

See *Horak* as an example of the fulfillment of a condition of the ancient-document authentication illustration at Wis. Stat. § 909.015(8)(b)—that a document "[w]as in a place where it, if authentic, would likely be"—namely, in the office of the attorney of the document's owner.

State v. Guerard, 2004 WI 85, ¶¶ 22–24, 273 Wis. 2d 250, 682 N.W.2d 12.

The admissibility of a statement offered under Wis. Stat. § 908.045(4) that tends to expose the declarant to criminal liability and that is offered to exculpate the accused presents a question of conditional relevance, i.e., the requisite corroboration.

State v. Gray, 225 Wis. 2d 39, 59–61, 590 N.W.2d 918 (1999).

To determine the relevance of other acts evidence that is conditioned on showing another fact, the court should neither weigh credibility nor determine whether the state proved the conditional fact. The trial court must examine all the evidence presented to the jury and determine whether a reasonable jury could find the conditional fact by a preponderance of the evidence.

State v. Schindler, 146 Wis. 2d 47, 53–54, 429 N.W.2d 110 (Ct. App. 1988).

It is unnecessary for the trial court to make a preliminary finding that the prior act occurred. The trial court neither weighs credibility nor makes a finding that the state has proved the conditional fact. The court simply examines all the evidence and decides whether the jury could

reasonably find the conditional fact by a preponderance of the evidence.

Because this section of the Wisconsin Rules of Evidence is identical to the Federal Rules of Evidence, the court adopted the federal analysis.

(3) Hearing out of the Presence of a Jury

(4) Testimony by Accused

(5) Weight and Credibility

Reiman Assocs., Inc. v. R/A Advert., Inc., 102 Wis. 2d 305, 318, 306 N.W.2d 292 (Ct. App. 1981).

Although the standard of proof for admissibility of evidence subject to a preliminary fact determination is prescribed as evidence sufficient to support a finding of fact, the jury is the final arbiter of the weight and credibility of that testimony.

901.05 Admissibility of certain test results.

(1) In this section, "HIV" means any strain of human immunodeficiency virus, which causes acquired immunodeficiency syndrome.

(2) Except as provided in sub. (3), the results of an HIV test, as defined in s. 252.01(2m), are not admissible during the course of a civil or criminal action or proceeding or an administrative proceeding, as evidence of a person's character or a trait of his or her character for the purpose of proving that he or she acted in conformity with that character on a particular occasion unless the evidence is admissible under s. 904.04(1) or 904.05(2) and unless the following procedures are used:

(a) The court may determine the admissibility of evidence under this section only upon a pretrial motion.

(b) Evidence which is admissible under this section must be determined by the court upon pretrial motion to be material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced at trial.

(3) The results of a test or tests under s. 938.296(4) or (5) or 968.38(4) or (5), and the fact that a person has been ordered to submit to such a test or tests under s. 938.296(4) or (5) or 968.38(4) or (5) are not admissible during the course of a civil or criminal action or proceeding or an administrative proceeding.

Case Annotations

Doe v. Roe, 151 Wis. 2d 366, 375, 444 N.W.2d 437 (Ct. App. 1989).

Under former Wis. Stat. § 146.025(5)(a)9. [since renumbered as Wis. Stat. § 252.15(3m)(d)9.], HIV test results may be disclosed under a lawful court order, "except as provided in [Wis. Stat. §]901.05." This section only prohibits disclosure of HIV test results if the results are offered to show evidence of a person's character at trial and procedural safeguards of the section have not been complied with. Therefore, a court order requiring limited disclosure to the defendant of the plaintiff's HIV status was permissible in a medical malpractice action.

901.053 Admissibility of evidence relating to use of protective headgear while operating certain motor vehicles.

Evidence of use or nonuse of protective headgear by a person, other than a person required to wear protective headgear under s. 23.33(3g), 23.335(8)(a) or (b), or 347.485(1), who operates or is a passenger on a utility terrain vehicle, as defined in s. 23.33(1)(ng), a motorcycle, as defined in s. 340.01(32), an all-terrain vehicle, as defined in s. 340.01(2g), or a snowmobile, as defined in s. 340.01(58a), on or off a highway, is not admissible in any civil action for personal injury or property damage. This section does not apply to the introduction of such evidence in a civil action against the manufacturer or producer of the protective headgear arising out of any alleged deficiency or defect in the design or manufacture of the protective headgear or, with respect to such use of protective headgear, in a civil action on the sole issue of whether the protective headgear contributed to the personal injury or property damage incurred by another person.

901.055 Admissibility of results of dust testing for the presence of lead.

The results of a test for the presence of lead in dust are not admissible during the course of a civil or criminal action or proceeding or an administrative proceeding unless the test was conducted by a person certified for this purpose by the department of health services.

901.06 Limited admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Judicial Council Committee's Note (1974)

Wisconsin cases agree with the concept of limited admissibility with respect to a party, *Fisher v. Gibb*, 25 Wis. 2d 600, 131 N.W.2d 382 (1964), or a purpose, *Hack v. State Farm Mut. Auto. Ins. Co.*, 37 Wis. 2d 1, 154 N.W.2d 320 (1967); *Schmit v. Sekach*, 29 Wis. 2d 281, 139 N.W.2d 88 (1966). The limited purpose of evidence is determined at the time of its admission, upon timely objection and motion to restrict its use, *Seraphine v. Hardiman Oil Co.*, 44 Wis. 2d 60, 170 N.W.2d 739 (1969), or when its limited purpose later becomes apparent upon timely motion, *Huse v. Milwaukee County Expressway Comm'n*, 16 Wis. 2d 225, 114 N.W.2d 429 (1962). A request for a jury charge instruction limiting the purpose of evidence is required, *Illinois Steel v. Paczocha*, 139 Wis. 23, 119 N.W. 550 (1909); *Domasek v. Kluck*, 113 Wis. 336, 89 N.W. 139 (1902), but see *City of Baraboo v. Excelsior Creamery*, 171 Wis. 242, 177 N.W. 36 (1920).

S. 971.12(3) provides for separate trial or severance of defendants or other appropriate relief if a confession implicates a codefendant. A pretrial conference is an appropriate time to consider questions of limited admissibility that may arise at trial.

Case Annotations

State v. Gavigan, 111 Wis. 2d 150, 162, 330 N.W.2d 571 (1983).

In instructing jurors regarding the limited use of testimony, not only must the court tell jurors for what purposes the evidence may be used, but the court must also tell the jury for what purposes it cannot be used.

D.L. v. Huebner, 110 Wis. 2d 581, 608, 329 N.W.2d 890 (1983).

A trial court may take into account the adequacy of a limiting instruction in exercising its discretion to admit evidence under Wis. Stat. § 904.03.

Johnson v. Misericordia Cmty. Hosp., 97 Wis. 2d 521, 548, 551, 294 N.W.2d 501 (Ct. App. 1980), *aff'd*, 99 Wis. 2d 708, 301 N.W.2d 156 (1981).

A request must be made for an order limiting admissibility. It is not automatic.

State v. Amundson, 69 Wis. 2d 554, 570, 230 N.W.2d 775 (1975), *overruled on other grounds by State v. Wayerski*, 2019 WI 11, 385 Wis. 2d 344, 922 N.W.2d 468.

The burden of obtaining an order limiting the use of evidence is on the party who opposes unlimited admission.

901.07 Remainder of or related writings or statements.

When any part of a writing or statement, whether recorded or unrecorded, is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or statement which ought in fairness to be considered contemporaneously with it to provide context or prevent distortion.

Judicial Council Note (2017)

This amendment is consistent with *State v. Eugenio*, 219 Wis. 2d 391, 410, 579 N.W.2d 642, 651 (1998), which acknowledged that the rule of completeness is applicable to oral testimony, and with *State v. Anderson*, 230 Wis. 2d 121, 600 N.W.2d 913 (Ct. App. 1999), *review denied*, 230 Wis. 2d 275, 604 N.W.2d 573 (1999), which provided guidance on how, and when, to apply the rule of completeness.

> "The rule of completeness, however, should not be viewed as an unbridled opportunity to open the door to otherwise inadmissible evidence. Under the rule of completeness the court has discretion to admit only those statements which are necessary to provide context and prevent distortion. The circuit court must closely scrutinize the proffered additional statements to avert abuse of the rule … '[A]n out-of-court statement that is inconsistent with the declarant's

trial testimony does not carry with it, like some evidentiary Trojan Horse, the entire regiment of other out-of-court statements that might have been made contemporaneously.'" *Eugenio*, 219 Wis. 2d at 412 (citations omitted).

Judicial Council Committee's Note (1974)

This section is consistent with *Merlino v. Mutual Service Cas. Ins. Co.*, 23 Wis. 2d 571, 127 N.W.2d 741 (1964), dealing with writings and expands its rule to "recorded statements."

Case Annotations

State v. Marks, 2010 WI App 172, ¶¶ 21–22, 330 Wis. 2d 693, 794 N.W.2d 547.

The proponent of an out-of-court statement under the rule of completeness must show that the proffered evidence is necessary to correct a distorted impression created by the already-received evidence.

State v. Sugden (In re Commitment of Sugden), 2010 WI App 166, ¶¶ 30–35, 330 Wis. 2d 628, 795 N.W.2d 456.

While "the rule of completeness" requires that additional portions of a document may be introduced into evidence, even if otherwise inadmissible, a court need admit only those additional statements that are necessary to provide context and prevent distortion. Thus, in a trial to determine whether an individual was a sexually violent person, it was appropriate to exclude excerpts from an expert's report regarding the individual's potential dangerousness while under postcommitment supervision because that evidence could have misled the jury to take postcommitment supervision into account in determining likelihood of reoffending.

State v. Anderson, 230 Wis. 2d 121, 143–45, 600 N.W.2d 913 (Ct. App. 1999).

When a defendant in a criminal case objects to testimony of the defendant's out-of-court statement as incomplete, or attempts to cross-examine the witness about additional portions of the defendant's out-of-court statement and the state objects, the court should make the discretionary determination required by *Eugenio* to admit those portions of the statement that are necessary to provide context and prevent distortion, without regard to whether the defendant intends to testify. A defendant, under this rule, is not entitled to have admitted other parts of the statement not necessary to avoid a misleading or distorted impression.

Once the court has determined that any additional portion of the statement is necessary, the timing of the presentation is discretionary. The court may allow it during the state's case or when the defense recalls the witness during its case.

State v. Eugenio, 219 Wis. 2d 391, 407–12, 579 N.W.2d 642 (1998).

Under the rule of completeness, the court has discretion to admit only those statements that are necessary to provide context and prevent distortion. The common-law rule of completeness, as applied to oral statements, is codified as part of Wis. Stat. § 906.11.

State v. Briggs, 214 Wis. 2d 281, 292–93, 571 N.W.2d 881 (Ct. App. 1997).

The "rule of completeness" is a rule of fairness. In a criminal trial, at which the state read approximately 10 pages from the defendant's 158-page sworn statement that was received into evidence as an exception to the hearsay rule under Wis. Stat. § 908.01(4)(b), it was not unfair for the trial court, in its discretion, to preclude defense counsel from reading substantial portions from the balance of the statement, because that would have allowed the defendant to testify without taking the stand and facing cross-examination.

901.08 Admissibility of sexual conduct.

(1) In this section:

(a) "Sexual conduct" means any conduct or behavior relating to sexual activities, including prior experience of sexual intercourse or sexual contact, use of contraceptives, and sexual life-style.

(b) "Sexual misconduct" includes a violation of s. 940.22(2), 940.225(1), (2), or (3), 940.32, 942.08, 942.09, 948.02, 948.025, 948.05(1) or (1m), 948.055(1), 948.06, 948.07, 948.075, 948.08, 948.081, 948.09, 948.095, 948.10, or 948.11(2) and includes sexual harassment, as defined in s. 111.32(13).

(c) "Victim" means a person against whom sexual misconduct allegedly has been committed.

(2) In a civil action involving damages for an injury resulting from sexual misconduct, any evidence concerning a victim's sexual conduct, opinions of the victim's sexual conduct, and reputation as to the victim's sexual conduct, offered to prove that the victim

engaged in other sexual conduct or to prove the victim's sexual predisposition may not be admitted into evidence during the course of any hearing or trial, nor may any reference to such sexual conduct be made in the presence of the jury, except the following:

(a) Evidence of the specific, consensual sexual conduct between the alleged offender and the victim.

(b) Evidence of specific instances of sexual conduct by the alleged victim after an in camera showing by the party requesting the admission that the sexual conduct was the actual cause of the victim's injury for which damages are requested in the action.

Authors' Note. *See also* Wis. Stat. § 972.11(2) (rape shield law).

901.09 Submission of writings; languages other than English.

(1) The court may require that a writing in a language other than English offered in evidence be accompanied by a written translation of the writing into English with an attached affidavit by the translator stating his or her qualifications to perform the translation and certifying that the translation is true and correct.

(2) A party may object to all or parts of a translation offered under sub. (1) or to the qualifications of the translator. The court may order a party objecting to all or part of a translation to submit an alternate translation of those parts of the original translation to which the party objects, accompanied by a translator's affidavit as described in sub. (1). If an objection is made to the qualifications of the translator and the court finds that the translator is not qualified the court may reject the offered translation on that ground alone without requiring an alternative translation by the objecting party.

(3) The court may require a party offering into evidence a translation under sub. (1) or an alternative translation ordered by the court under sub. (2) to bear the cost of the translation.

Comment, 2010 (Wis. Sup. Ct. Order 09-03, 2010 WI 100)

This rule is not intended to apply strictly to evidence in documentary form. Parties often offer evidence not contained in documents that consists of or contains statements made in a foreign language, for example, recordings of telephone calls to 911 operators, recordings of police interrogations, and surveillance recordings. The better practice when offering such evidence is for a party to offer a written transcript of the recording, to aid the jury or the court in understanding the recording. Sometimes the transcript is received as evidence, but not always, and in any event the recording is considered primary and the transcript merely an aid. If a party offers in evidence a recording accompanied by a transcript, this rule governs the transcript.

This rule does not require the court to provide the party with an interpreter for purposes of preparing the translation required by this rule.

Authors' Note. *See also* SCR 70.155(5) (requiring translator's affidavit for any translation of a form from English into another language).

Chapter 4
Adjudicative Facts

902.01 Judicial notice of adjudicative facts.

(1) Scope. This section governs only judicial notice of adjudicative facts.

(2) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is any of the following:

(a) A fact generally known within the territorial jurisdiction of the trial court.

(b) A fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(3) When discretionary. A judge or court may take judicial notice, whether requested or not.

(4) When mandatory. A judge or court shall take judicial notice if requested by a party and supplied with the necessary information.

(5) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(6) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(7) Instructing jury. The judge shall instruct the jury to accept as established any facts judicially noticed.

Judicial Council Committee's Note (1974)

Sub. (1). Wisconsin acknowledges differing treatment for judicial notice of "adjudicative" and "legislative" facts. *State v. Barnes*, 52 Wis. 2d 82, 187 N.W.2d 845 (1971); *Fringer v. Venema*, 26 Wis. 2d 366, 132 N.W.2d 565 (1965), *rehearing denied and mandate corrected* 26 Wis. 2d 366, 133 N.W.2d 809; *North End Foundry Co. v. Industrial Commission*, 217 Wis. 363, 371, 258 N.W. 439, 442 (1935). It is important to note that "legislative facts" deal not only with the content of law and policy but are also those "which help the tribunal … to exercise its judgment and discretion in determining what course of action to take."

> A human being is probably unable to consider a problem—whether of fact, law, policy, judgment, or discretion—without using his past experience, much of which may be factual and much highly disputable.… Fact finding, law making, and policy formulation should be guided by experience and understanding, not limited to wooden judgment predicated upon the literal words of witnesses.… The wisdom we seek … is made up of multifarious ingredients that often defy identification and usually defy separation from other ingredients—knowledge of specific facts, understanding of general facts, prior experience in trying to solve similar problems, mental processes such as logic or reasoning and mental processes such as appraising or estimating or guessing, formulation and application of notions of policy, imagination, inventiveness and intuition, emotional reactions and emotional control.… Thayer was clearly right when he wrote in 1898: "In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved."

Davis, *Judicial Notice*, 55 Colum. L. Rev. 945, 949 (1955). Juries in the performance of the decisional process are limited to the "legislative facts" with which they come equipped or of which they are informed by the judge. A judge acting as trier of the facts has the opportunity for research. McCormick concludes that

> Judicial notice is not merely a substitute for formal proof by witnesses but is itself another method of proof of certain kinds of facts, namely, the method of research into the professionally authoritative books and reports in the particular field.

C. McCormick, *Law of Evidence* s. 331 (1954) [hereinafter cited as McCormick]. As Davis says:

> Of course, if "research into the professionally authoritative books and reports" is appropriate, its effectiveness will be destroyed if the research is limited to the indisputable or if the facts discovered are never mixed with uncertain judgment.… A most vital observation is that the difference between appearing to stay within the record and frankly acknowledging resort to extra-record sources for legislative facts is usually only a difference in the degree of articulation of the grounds for decision. If all judgment has a factual basis only a part of which comes from the record, the judge or administrative officer who fully explains the process of arriving at his decision will appear to go beyond the record, but the judge or officer who announces only conclusions will appear to stay within the record. Yet the opinion which specifically identifies extra-record materials used in creating law or in determining policy may involve less reliance on extra-record information than the more conventional opinion purporting to rest exclusively upon the record but which in reality is heavily dependent upon the assumption of unproved facts that are left vague and unidentified.

Davis, *Judicial Notice*, 55 Colum. L. Rev. 945, 951–53 (1955). The subject of judicial notice of "legislative fact" in the full range of its definition is not affected by s. 902.01, but is left to common law growth and development. It is, of course, affected by the same considerations of reconciling the facilitation of a tribunal's access to facts while assuring that parties are given appropriate opportunity to test their validity.

Sub. (2). This subsection is consistent with the standard of "verifiable certainty" of adjudicative facts judicially noticed which is adopted in *Fringer v. Venema*, *supra*.

Subs. (3) and (4). Wisconsin cases assert that taking judicial notice is "discretionary" with the appellate court, *Chicago & N.W.R. Co. v. LaFollette*, 27 Wis. 2d 505, 135 N.W.2d 269 (1965); *State v. Chippewa Cable Co.*, 21 Wis. 2d 598, 124 N.W.2d 616 (1963); *Associated Hospital Service v. City of Milwaukee*, 13 Wis. 2d 447, 109 N.W.2d 271 (1961), 88 A.L.R.2d 1395; and *Ritholz v. Johnson*, 244 Wis. 494, 12 N.W.2d 738 (1944); and the trial court, *Schmiedeck v. Gerard*, 42 Wis. 2d 135, 166 N.W.2d 136 (1969); *Fringer v. Venema*, 26 Wis. 2d 366, 132 N.W.2d 565

(1965), *rehearing denied and mandate corrected* 26 Wis. 2d 366, 133 N.W.2d 809. The description "discretionary" is clearly applicable to the court's sua sponte use of judicial notice; it is not so clear that it is applicable to judicial refusal to take requested notice of an indisputable adjudicative fact (e.g., the time of sunset) for which the necessary information has been supplied. The decision in *Schmiedeck v. Gerard*, *supra*, although describing such a circumstance as "discretionary," finds refusal to take notice of an indisputable fact to be an abuse of discretion although in that case it was not prejudicial. To make the taking of judicial notice mandatory when it has been requested and the necessary information has been supplied seems to effect little practical change. Determining whether the "necessary" information is supplied would still seem to be a matter of judgment. This section would conform to the treatment of judicial notice prescribed by s. 891.01 (902.01), *Milwaukee Cheese Co. v. Olafsson*, 40 Wis. 2d 575, 162 N.W.2d 609 (1968), and s. 891.021 (902.03), *Bear v. Kenosha County*, 22 Wis. 2d 92, 125 N.W.2d 375 (1963).

Subs. (5) and (6). These subsections are consistent with the official notice provision, s. 227.10(3), of the state administrative procedure act, but would withdraw the requirement of advance notice of intent to take judicial notice prescribed in the Model Code rules 804 and 806, and Uniform Rules 10 and 12 for trial and appellate courts. Such advance notice requirement was adopted for trial courts, but not appellate courts in *State v. Barnes*, *supra*. The requirement of notice of intent to take judicial notice and the requirement that trial courts take judicial notice prior to judgment established in *State v. Barnes* is withdrawn. Opportunity to dispute the propriety of taking judicial notice is provided by the rehearing and reconsideration provisions of ss. 251.65 and 269.46(3). See Currie, *Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation*, 1960 Wis. L. Rev. 39, 49 to 53.

Sub. (7). The proper application of this subdivision requires a thorough understanding of the concept of an "adjudicative fact." The distinction between "adjudicative facts" and "legislative facts" is neither mutually exclusive nor static. What in one case may be a "legislative fact" may be an "adjudicative fact" in another case. To be judicially noticed, an "adjudicative fact" must be indisputable and when judicially noticed no evidence in disproof of that "adjudicative fact" is admissible. Thus the rule that the jury is to be instructed to accept as established any "adjudicative facts" judicially noticed. The form of the instruction is not prescribed; it may be an instruction from the bench at the time judicial notice is taken or it may be incorporated in the jury charge.

There may be "legislative facts" which are judicially noticed. They are not governed by this rule. They may or may not require a jury instruction. If such an instruction is required it usually informs the jury how the "legislative fact" (e.g., stopping distance and mortality tables) may be used as an aid in evaluating the adjudicative facts. If such an instruction is not required it is because it will be assumed that the "legislative fact" is so within the "common knowledge and experience" of the jury that it does not need specific mention.

Case Annotations

(1) Scope

(2) Kinds of Facts

Coppins v. Allstate Indem. Co., 2014 WI App 125, ¶¶ 6–9, 359 Wis. 2d 179, 857 N.W.2d 896.

In a property-damage case in which the parties disputed the definition of the phrase *actual cash value* as used in an insurance policy, the court of appeals took judicial notice of the definitions of that phrase from (1) the insurance company's website; (2) the Wisconsin Office of the Commissioner of Insurance; (3) *Black's Law Dictionary*; and (4) Wikipedia.

Kirk v. Credit Acceptance Corp., 2013 WI App 32, ¶ 5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

A court may take judicial notice of Wisconsin's Consolidated Court Automation Programs (CCAP) record.

Wisconsin Med. Soc'y, Inc. v. Morgan, 2010 WI 94, ¶ 18 n.7, 328 Wis. 2d 469, 787 N.W.2d 22.

A court may take judicial notice of state records that are easily accessible.

Sisson v. Hansen Storage Co., 2008 WI App 111, ¶¶ 10–12, 313 Wis. 2d 411, 756 N.W.2d 667.

A court may take judicial notice of matters of public record—in this instance, notice of a carrier's registration in Iowa.

State v. Sarnowski, 2005 WI App 48, ¶¶ 13–16, 280 Wis. 2d 243, 694 N.W.2d 498.

In a child nonsupport trial, the trial judge, based on her personal experience in looking for carpenters to work on her house, improperly took judicial notice of the fact that the defendant could find work as a carpenter during a certain time. This determination was not a fact subject to judicial notice, because it was neither a fact generally known within the territorial jurisdiction of the court, nor a fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

State v. Williams, 2001 WI 21, ¶ 38 n.14, 241 Wis. 2d 631, 623 N.W.2d 106.

In a criminal prosecution, in which a fact question developed as to whether a city had adopted a "sophisticated" 911 system that automatically identified the location and telephone number of a caller/informant, the court could not take judicial notice of the existence of such a system based on some suggestive inferences in the record. The supreme court reasoned that the fact was subject to reasonable dispute, and no notice was given to the parties of the court's interest in taking judicial notice so as to provide the parties with the opportunity to consult the same sources used by the court or to produce others.

Lambrecht v. Estate of Kaczmarczyk, 2001 WI 25, ¶ 11 & n.9, 241 Wis. 2d 804, 623 N.W.2d 751.

The time of sunset on the date of an automobile accident is the type of fact capable of accurate and ready determination by a source—in this case, the *Old Farmer's Almanac*—whose accuracy cannot reasonably be questioned.

State v. Peterson, 222 Wis. 2d 449, 457–59, 588 N.W.2d 84 (Ct. App. 1998).

A trial judge may not simply rely on the judge's own personal knowledge or experience to take judicial notice of a fact. Rather, under Wis. Stat. § 902.01(2)(a), a judicially noticed fact must be generally known within the territorial jurisdiction of the trial court. Here, the court could not take judicial notice of what a person could see on a river at night, because that evidence was not a part of the record, nor a generally known fact.

Tomlinson v. MidAmerica Mut. Life Ins. Co., 168 Wis. 2d 92, 98–99, 483 N.W.2d 234 (Ct. App. 1992).

A court may not take judicial notice that the mere fact of pregnancy alone influences premium rates or otherwise increases the risk under an insurance policy that excludes coverage for normal pregnancies.

Bisone v. Bisone, 165 Wis. 2d 114, 122, 477 N.W.2d 59 (Ct. App. 1991).

In determining maintenance and child support in a divorce proceeding, the trial court may take judicial notice of tax tables and tax laws input into a computer program.

Hoeft v. Friedli (In re Est. of Friedli), 164 Wis. 2d 178, 190, 473 N.W.2d 604 (Ct. App. 1991).

Taking judicial notice of a person's sense of humor is the same as taking judicial notice of a person's reputation. It is improper and an erroneous exercise of discretion to take judicial notice of such matters because they might be subject to differences of opinion.

D.B. v. Waukesha Cnty. Hum. Servs. Dep't (In the Int. of J.A.B.), 153 Wis. 2d 761, 768, 451 N.W.2d 799 (Ct. App. 1989).

A court may take judicial notice of facts about its usual procedures, but inferences drawn from those facts are not appropriate for judicial notice. Thus, in an action for the termination of parental rights, the court could have judicially noticed that it usually attached a copy of the termination warnings to each written order for placing a child outside a home and then sent the order and the warnings to the parent. However, the court could not draw an inference and conclude that the warnings had in fact been attached to the order.

State v. Christian, 142 Wis. 2d 742, 746, 419 N.W.2d 319 (Ct. App. 1987).

A court cannot take judicial notice of its own records in another case. Moreover, confidential records from a proceeding for a child in need of protection or services (CHIPS) are not "facts that are generally known or capable of accurate and ready determination" and, therefore, are not facts that can be judicially noticed.

State v. Hinz, 121 Wis. 2d 282, 286, 360 N.W.2d 56 (Ct. App. 1984).

A court may take judicial notice of a blood alcohol chart contained in a Department of Transportation pamphlet. It is no different than stopping distance charts, which have been admissible in Wisconsin for many years.

State v. Gilbert, 109 Wis. 2d 501, 504 n.3, 326 N.W.2d 744 (1982).

A court may take judicial notice of many facts that are matters of indisputable common knowledge, but it cannot take judicial notice of records that are not immediately accessible to it or are not under its immediate control.

State v. Holmes, 106 Wis. 2d 31, 70, 315 N.W.2d 703 (1982).

Judicial notice may be taken of statistics gathered by the Office of the Director of State Courts as to case filings and substitution requests.

Kollasch v. Adamany, 99 Wis. 2d 533, 556, 299 N.W.2d 891 (Ct. App. 1980), *rev'd*, 104 Wis. 2d 552, 313 N.W.2d 47 (1981).

The fact that retailers that prepare and sell meals collect sales tax from customers is a proper subject of judicial notice.

Johnson v. Misericordia Cmty. Hosp., 97 Wis. 2d 521, 553, 294 N.W.2d 501 (Ct. App. 1980), *aff'd*, 99 Wis. 2d 708, 301 N.W.2d 156 (1981).

The fact that other medical negligence suits against the defendant had been filed was a proper subject of judicial notice.

State ex rel. Cholka v. Johnson, 96 Wis. 2d 704, 713, 292 N.W.2d 835 (1980).

The facts that Southern Comfort is an intoxicating liquor and that excessive consumption can cause death were properly recognizable by judicial notice.

State v. Hanson, 85 Wis. 2d 233, 244, 270 N.W.2d 212 (1978).
The reliability of the underlying principles of radar may be established by judicial notice, under certain circumstances.

Stevens v. White Motor Corp., 77 Wis. 2d 64, 72, 252 N.W.2d 88 (1977).
The fact that large numbers of trucks were manufactured by one of the parties and were present in Wisconsin was a proper subject of judicial notice.

(3) When Discretionary

Estate of Kriefall v. Sizzler USA Franchise, Inc., 2011 WI App 101, ¶ 60 & n.20, 335 Wis. 2d 151, 801 N.W.2d 781, *aff'd on other grounds*, 2012 WI 70, 342 Wis. 2d 29, 816 N.W.2d 853.
A court may take judicial notice of information that receives pervasive media attention, such as the danger of cross-contamination between raw meat and food that is not going to be cooked.

State ex rel. Strykowski v. Wilkie, 81 Wis. 2d 491, 504, 261 N.W.2d 434 (1978).
Materials in the Legislative Reference Bureau are proper subjects of judicial notice.

State ex rel. Gebarski v. Milwaukee Cnty. Cir. Ct., 80 Wis. 2d 489, 500, 259 N.W.2d 531 (1977).
A law review article written by a bill's drafter is a proper subject for judicial notice.

(4) When Mandatory

(5) Opportunity to Be Heard

Sisson v. Hansen Storage Co., 2008 WI App 111, ¶ 13, 313 Wis. 2d 411, 756 N.W.2d 667.
The opponent to a request for taking judicial notice must have an opportunity to object and to supply evidence or make an offer of proof to show the subject is disputable and therefore not subject to the taking of judicial notice.

(6) Time of Taking Notice

State v. Koeppen, 195 Wis. 2d 117, 128–29, 536 N.W.2d 386 (Ct. App. 1995).
The state's failure at a sentencing hearing to prove repeater convictions, which would have been used to enhance the defendant's penalty, could not be cured by the court's taking judicial notice of the convictions at a postsentencing proceeding. Although there may be instances in which technical information wrongly omitted can be supplied after the fact by judicial notice, a failure of necessary substantive proof cannot be corrected by this method.

State v. Wachsmuth, 73 Wis. 2d 318, 331, 243 N.W.2d 410 (1976).
Judicial notice of adjudicative facts may be taken at any stage of the proceedings, including when a case is on appeal and reviewed by the supreme court.

(7) Instructing Jury

State v. Harvey, 2002 WI 93, ¶¶ 29, 47, 254 Wis. 2d 442, 647 N.W.2d 189.
In a criminal prosecution for possession of cocaine with intent to deliver, with a penalty enhancement for commission of the offense within 1,000 feet of a city park, it was constitutional error—although, ultimately, harmless error—for the court to take judicial notice of the fact that the status of the park in question was a city park and instruct the jury that it must accept the judicially noticed elemental fact as true because the court's action operated as a mandatory conclusive presumption in violation of the defendant's due process and jury trial rights. There would have been no constitutional error had the jury been instructed that it may, but need not, accept the judicially noticed elemental fact as true.

902.02 Uniform judicial notice of foreign law act.
(1) COURTS TAKE NOTICE. Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States.

(2) INFORMATION OF THE COURT. The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information.

(3) DETERMINED BY COURT; RULING REVIEWABLE. The determination of such laws shall be made by the court and not by the jury, and shall be reviewable.

(4) EVIDENCE OF FOREIGN LAW. Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise.

(5) FOREIGN COUNTRY. The law of a jurisdiction other than those referred to in sub. (1) shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice.

(6) INTERPRETATION. This section shall be so interpreted as to make uniform the law of those states which enact it.

(7) SHORT TITLE. This section may be cited as the Uniform Judicial Notice of Foreign Law Act.

Judicial Council Committee's Note (1974)

This section differs from s. 902.01 by dealing with foreign law. It was formerly s. 891.01. Wisconsin courts have long taken judicial notice of the constitution and statutes of the United States, *Finsky v. State*, 176 Wis. 481, 187 N.W. 201 (1922), although it may have been necessary to adequately bring the court's attention to the matter through proper pleadings and proof. *Rowlands v. Chicago & N.W.R. Co.*, 149 Wis. 51, 135 N.W. 156, Ann.Cas. 916E, 714 (1912), *error dismissed Chicago & N.W.R.Co. v. Rowlands*, 33 S.Ct. 771, 229 U.S. 627, 57 L.Ed. 1357. The territorial court included treaties, *United States v. De Coursey*, 1 Pin. 508 (1845). A predecessor statute (Wis. Laws 1927, ch.523) did not include the common law, *Switzer v. Weiner*, 230 Wis. 599, 284 N.W. 509 (1939). However, when repealed and recreated as s. 891.01 (Act of July 8, 1947, ch. 363 [1947] Wis. Laws 615), the common law was included. This section is incorporated for the convenience of attorneys. Its counterpart is found in Fed. R. Civ. P. 44.1 and Fed. R. Crim. P. 26.1.

Case Annotations

(1) Courts Take Notice

State v. Seigel, 163 Wis. 2d 871, 883–84, 472 N.W.2d 584 (Ct. App. 1991).
Judicial notice of the Illinois Fireworks Regulation Act was not erroneous because the act was relevant.

State v. Ritter, 74 Wis. 2d 227, 232, 246 N.W.2d 552 (1976).
In an extradition case, the courts of the asylum state may take judicial notice of statutes of the demanding state to determine whether a crime has been charged.

(2) Information of the Court

(3) Determined by Court; Ruling Reviewable

(4) Evidence of Foreign Law

(5) Foreign Country

Hennessey v. Wells Fargo Bank, N.A., 2022 WI 2, ¶ 37, 400 Wis. 2d 50, 968 N.W.2d 684.
A foreign country's law must be proved before a circuit court as a question of fact. The circuit court's determination is therefore reviewed on appeal under the "clearly erroneous" standard.

(6) Interpretation

(7) Short Title

902.03 County and municipal ordinances; administrative rules of state and federal agencies.

(1) The courts of this state, including the court of appeals and the supreme court, shall take judicial notice of:

(a) County and municipal ordinances in those counties in which the particular court has jurisdiction; and

(b) All rules of state agencies which have been published in the Wisconsin administrative code or register and all orders of such agencies.

(2) The courts of this state, including the court of appeals and the supreme court, may take judicial notice, if requested by a party and supplied with the necessary information, of all rules and orders of federal agencies.

Legislative Council Notes, 1977

This section adds references to the court of appeals to the statutes specifying what ordinances, administrative rules and orders are proper subjects of judicial notice.

Judicial Council Committee's Note (1974)

This section was formerly s. 891.021. It has been expanded to permit the discretionary taking of judicial notice of rules and orders of federal agencies. This section does not primarily deal with adjudicative facts. Rather it deals with local law and thus, primarily legislative facts. It is included for the convenience of attorneys.

Case Annotations

Krauza v. Mauritz, 78 Wis. 2d 276, 283, 254 N.W.2d 251 (1977).
Failure of a party's counsel to produce a certified copy of an ordinance as ordered by the trial court was not error, because the trial court was allowed by this section to take judicial notice of the ordinance.

Chapter 5
In General Civil Proceedings

903.01 Presumptions in general.
Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain basic facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

Judicial Council Committee's Note (1974)

The proposed federal rule has been modified for the purpose of clarity. No substantive change is intended.

The Model Code of Evidence (1942) [hereinafter cited as Model Code] adopted the "bursting bubble" theory of presumptions authored by Thayer and accepted and popularized by Wigmore, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact. By a vote of 59 to 42, the Thayer view was embodied in the Model Code contrary to the recommendation of professors Morgan and Maguire, the draftsmen of the Code. The Uniform Rules of Evidence, however, adopted the views of Morgan and Maguire.

Under the Model Code, the jury was not to learn of the presumption for it was a tool exclusively used by the judge. Its procedural effect was to shift the burden of producing evidence (not persuasion) of the nonexistence of the presumed fact to the party against whom the presumption operates. "Presumptions are applied to compel the production of evidence, if any exists, …" *Hanson v. Engebretson*, 239 Wis. 126, 133, 294

N.W. 817, 820 (1941). Where the presumed fact was essential, the judge determined whether that burden had been met upon motions for nonsuit or directed verdict.

The Uniform Rules of Evidence (1953) [hereinafter cited as Uniform Rules] rejected Thayer and accepted Morgan and Maguire with respect to presumptions derived from facts which have probative value as evidence of the existence of the presumed fact (presumptions "based upon logic," or "grounded upon a reasonable inference"). The burden of persuasion as well as the burden of producing evidence was shifted, and although rebutting evidence had been produced, the inference from the presumption survived and was sufficient to support a jury verdict and the jury was to be instructed with respect to the presumption and told that it shall stand until met by evidence of equal weight. The Uniform Rules also rejected Thayer's theory that conflicting presumptions cancel each other and provided that the judge apply the presumption which is founded on the weightier considerations of policy and logic unless the conflicting presumptions stood in equilibrium, in which event they were both to be disregarded. Under the Uniform Rules, presumptions derived from facts which have no probative value as evidence of the presumed fact ("presumptions based on policy") continue to be treated under the "bursting bubble" theory of the Model Code.

S. 903.01 accords to presumptions based on policy the same effect as those based upon logic or reasonable inference by shifting the burden of persuasion as well as the burden of producing evidence. The section effectuates a major change in Wisconsin law.

After its 1942 promulgation, Wisconsin, without adopting Rule 704, seems to have favored the Model Code view of the effect of presumptions, *Bartlett v. Joint County School Committee of Milwaukee and Ozaukee Counties*, 11 Wis. 2d 588, 106 N.W.2d 295 (1960); *Scholz v. Industrial Commission*, 267 Wis. 31, 65 N.W.2d 1 (1954); *McCarty v. Weber*, 265 Wis. 70, 60 N.W.2d 716 (1953); and rejected the idea of a shift of the burden of persuasion, *Will of Faulks*, 246 Wis. 319, 17 N.W.2d 423 (1945); although earlier cases deal with the subjects inconsistently, Geraldson, *Effect of Presumptions*, 26 Marq. L. Rev. 115 (1942) and Geraldson, *A Code of Evidence for Wisconsin: Presumptions and Their Effect*, 1945 Wis. L. Rev. 374. Similarly inconsistent was the Wisconsin treatment of the presumption against suicide, *Tully v. Prudential Ins. Co. of America*, 234 Wis. 549, 291 N.W. 804 (1940); *Wiger v. Mutual Life Ins. Co. of New York*, 205 Wis. 95, 236 N.W. 534 (1931); *Fehrer v. Midland Casualty Co.*, 179 Wis. 431, 190 N.W. 910 (1923); and the presumption of legitimacy, *Schmidt v. Schmidt*, 21 Wis. 2d 433, 124 N.W.2d 569 (1963); *Zschock v. Industrial Commission*, 11 Wis. 2d 231, 105 N.W.2d 374 (1960); *In re Aronson*, 263 Wis. 604, 58 N.W.2d 553 (1953); although the latter was also specially treated in Rule 703 of the Model Code.

In *Schlichting v. Schlichting*, 15 Wis. 2d 147, 112 N.W.2d 149 (1961), Wisconsin rejected the bursting bubble theory with respect to presumptions based upon logic or reasonable inferences and acknowledged that where rebutting evidence had been introduced, the presumption survived as a reasonable inference and was sufficient to support a jury finding in favor of the presumed fact without corroborative evidence and could be brought to the attention of the jury by appropriate instructions. The *Schlichting* decision was not equivalent to the adoption of the Uniform Rule treatment of presumptions based upon logic or reasonable inference because the court did not agree to the shift of the burden of persuasion.

A weakness of the Uniform Rule treatment is the need for a determination by the court whether a presumption is based upon "logic," "probability," or "reasonable inference" as distinguished from one based on "policy." Illustrative of the difficulty of such a determination is *Sperbeck v. Dep't of Industry, Labor and Human Relations*, 46 Wis. 2d 282, 174 N.W.2d 546 (1970), where, although the trial court and the appellate court found that the presumption was based upon "probability," a thorough reading of the case illustrates circumstances that would justify a determination that the presumption was based upon "policy." There seems to be no basis for perpetuating a distinction between presumptions. Elimination of the distinction may serve to eliminate confusion in the applicable law.

The shift of the burden of persuasion in civil cases is laid at rest as a constitutional problem in *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959), and *Berg v. Board of Regents of State Universities*, 40 Wis. 2d 657, 162 N.W.2d 653 (1968). A change in a rule of evidence invades no vested rights and may apply to pending cases. *State ex rel. Sowle v. Brittich*, 7 Wis. 2d 353, 96 N.W.2d 337 (1959); *Whilhelm v. Columbian Knights*, 149 Wis. 585, 136 N.W. 160 (1912).

The Federal Advisory Committee acknowledges:

> Differences between the permissible operation of presumptions against the accused in criminal cases and in other situations prevent the formulation of a comprehensive definition, and none if attempted.

As the Committee points out, the axiom that a verdict cannot be directed against the accused in a criminal case has developed the corollary that the judge is without authority to direct the jury to find against the accused as to any element of the crime. The Committee notes that although a judge could direct the jury to find against the accused as to a lesser fact, tradition is against it. Uniform Rule 13 defines a presumption as "an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action." That definition is consistent with *Egger v. Northwestern Mut. Ins. Co.*, 203 Wis. 329, 234 N.W. 328 (1931), differs from a permissible inference, *Ryan v. Zweck-Wollenberg Co.*, 266 Wis. 630, 647, 64 N.W.2d 226, 235 (1954), and is in accord with the Model Code and the Uniform Rules as well as the Wisconsin cases.

S. 903.01 describes the procedural effect of a presumption as shifting the burden of persuasion and producing evidence. Uniform Rule 13 describes the procedural result of a presumption as requiring the finding of a presumed fact. This section applies to civil cases. It does not apply to permissible inferences or the Wisconsin permissible inference theory of res ipsa loquitur. The approach of this chapter permits the flexibility of differing results in criminal and civil cases while maintaining a community of identity of presumptions in both cases. It also provides for growth in the development of the presumption as a procedural device. One author comments:

> Useful enough is the notion that presumptions are not all of one pattern, and that the tailoring of presumptions may be changed in the civil field, presumably within the bounds of procedural due process and what seems to be good policy in procedural matters. Neither of these ideas are at all new, and yet very often the nature of presumptions has been treated as a question of identifying an immutable law of the universe. Apparently, we may hope for the growth of the notion that the presumption is a mere procedural device, to be molded to suit efficiency and justice.

Fornoff, *Presumptions—the Proposed Federal Rules of Evidence*, 24 Ark. L. Rev. 401, 403 (1971).

Wisconsin follows the common law practice of a higher quantum of proof to overcome the "strong" presumptions. Uniform Rule 16 continues the common law principle that some "strong" presumptions are overcome only by higher standards of proof such as "beyond a reasonable doubt," or "clear and convincing evidence."

Implicit in the provision of s. 903.01, which provides that all presumptions shall have the same effect, is a uniform quantum of proof for each presumption. Thus, all presumptions at common law and all statutory presumption which do not express a quantum of proof will require the civil standard of proof as the quantum of evidence sufficient to prove that the nonexistence of the presumed fact is more probable than its existence. This is a major change in Wisconsin law.

Referring to such a rule providing that presumptions uniformly shift the burden of persuasion, Dean Gausewitz commented two decades ago:

> Legislatures … should adopt the latter rule. History teaches that courts in the past have not been willing ruthlessly to adhere to a rule that merely shifts the burden of producing evidence when this would do violence to the truth of policy in a particular case.… The Thayer rule is too weak for a presumption based upon a high degree of probability or important policy. The rule shifting the burden of persuasion is theoretically not much stronger. Theoretically it does not come into play unless the mind of the trier is in equilibrium after the evidence is all introduced, counsel have argued, and in a jury case, the judge has given his charge. As a practical matter it plays a part before the trier finds himself in doubt without it, because it is not left to be mentioned only if and when the trier is in doubt. But even then it is not too strong even for the weakest of presumptions. The fact that the law has taken the trouble to create a presumption is in any case evidence of its importance. The only doubt can be as to whether the mere shifting of the burden of persuasion 'that the nonexistence of the presumed fact is more probable than its existence' is sufficiently strong for the 'strong' presumptions. Of course it is not; otherwise courts would not in the past have required 'a clear, satisfactory and convincing preponderance' or some variant that is not satisfied by evidence sufficient to justify a finding, for some presumptions. But the very nature of procedure is to limit discretion and to ignore significant factors when their positive values are more than offset by the disadvantages of encumbering procedures or a confusing plethora of rules. One can recognize the substantive aspects of presumptions yet believe that the proponent of a presumption should be satisfied with a rule that puts the burden of producing evidence and persuading the trier on his opponent; the opponent, satisfied with a rule that leaves the issue open to litigation and merely requires him to produce evidence and persuade the trier.

Gausewitz, *Presumptions In A One-Rule World*, 5 Vand. L. Rev. 324, 342 (1952).

A statutory presumption that prescribes the quantum of proof necessary to overcome it is unaffected by this section.

There are numerous Wisconsin statutes that ascribe to certain documents or facts therein, or both, "prima facie," or "presumptive" evidence. This rule affords to those statutes a procedural result equal to a presumption. Section 903.01 cannot dilute their effect as would the Model Code or Uniform Rules with respect to presumptions. See Torkelson, *A Code of Evidence for Wisconsin: Rule 704 Relating to Presumptions and Its Effect on Certain Wisconsin Statues*, 1946 Wis. L. Rev. 410.

The Model Code adopted the Thayer view that inconsistent presumptions cancelled each other. Because the Uniform Rules shift the burden of persuasion with respect to some presumptions, but not others, it was necessary to promulgate Uniform Rule 15 dealing with inconsistent presumptions. Because presumptions under s. 903.01 would have equal procedural effect in civil cases, and under s. 903.03 would have equal procedural effect in criminal cases, there is no provision in these sections for the treatment of inconsistent presumptions. Should inconsistent presumptions be established in a case, the weight of the evidence establishing the facts upon which the presumptions are premised is for the trier of the fact and not to be dealt with by the judge in the discharge of his function with respect to the law.

Historical Background:

Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 Stan. L. Rev. 5–28 (1959).

Gausewitz, *Presumptions*, 40 Minn. L. Rev. 391–411 (1956).

McBain, *Burden of Proof: Presumptions*, 2 U.C.L.A. L. Rev. 13–31 (1954).

Morgan, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 Harv. L. Rev. 59–83 (1933).

Morgan and Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909–36 (1937).

The Proposed Federal Rules follow the foregoing treatment for presumptions where the state law does not provide the rule of decision under *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1938), (Rule 302). This is a major advance over the Model Code and the Uniform Rules. In effect, it is a complete adoption of Morgan's idea that there should be a simple uniform statute providing the same procedural effect for all presumptions. The New Jersey Rules of Evidence adopted the Uniform Rules of presumptions as did Utah. California moved ahead of the Uniform Rules by specifically providing for the shift of the burden of persuasion for some presumptions but continued the Thayer idea of a rebuttable presumption in other cases. California catalogued some of the presumptions that shifted the burden of persuasion and some which did not. Not all presumptions were catalogued and criteria were prescribed for the court to use in determining whether a presumption did or did not shift the burden of persuasion. The committee does not favor the California procedure (although better than New Jersey and Utah) because it perpetuates the Thayer view with regard to some presumptions which result in unequal treatment, and secondly, involved what is either a judicial or legislative act in attempting to catalog all of the presumptions. The rule changes proposed herein elevate all presumptions to a shift of a burden of persuasion, about which no sponsor of such a presumption can complain, and results in equal treatment. To the extent that statutes prescribe a higher quantum of proof to overcome a presumption, the statute remains unchanged by this section.

Rule 302 in the 1971 Revised Draft of the Proposed Federal Rules of Evidence [hereinafter cited as Federal Rules] provides that where state law provides the rule of decision under *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1938) the effect of a presumption is determined in accordance with state law. No such rule is needed in the Wisconsin statutes.

Federal Rule 302(c) of the 1969 draft was eliminated from the 1971 drafts. Set forth below is a simplified version of that rule. It is included in the note to suggest the kind of analysis that should be undertaken by the judge when he considers a motion for a directed verdict grounded upon a presumption.

The procedure for application of the presumptions referred to in s. 903.01 is as follows:

(1) *Determination On Evidence Relevant Solely to the Basic Facts.* When no evidence has been introduced contrary to the existence of the presumed fact, the question of its existence depends upon the existence of the basic facts:

(a) If reasonable minds would necessarily agree that the evidence renders the existence of the basic facts which give rise to the presumed fact more probable than not, the judge shall direct the jury to find the presumed fact; or

(b) If reasonable minds would necessarily agree that the evidence does not render the existence of the basic facts which give rise to the presumed fact more probable than not, the judge shall direct the jury to find the presumed fact does not exist; or

(c) If reasonable minds would not necessarily agree as to whether the evidence renders the existence of the basic facts which give rise to the presumed fact more probable than not, the judge shall submit to the jury the question of whether the basic facts exist, with the finding as to the existence or nonexistence of the presumed fact to depend upon the jury's determination as to the existence of the basic facts.

(2) *Determination When the Basic Facts Are Established But There Is Evidence Directly Disputing the Presumed Fact.* If the basic facts which give rise to the presumed fact have been found to exist, but evidence has been introduced which tends to prove that the presumed fact does not exist:

(a) If reasonable minds would necessarily agree as to its existence the judge shall direct the jury to find the presumed fact; or

(b) If reasonable minds would necessarily agree as to its nonexistence the judge shall direct the jury to find the presumed fact does not exist; or

(c) If reasonable minds would not necessarily agree as to the existence or the nonexistence of the presumed fact, the judge shall submit the matter to the jury with an instruction to find that the presumed fact exists unless they find from the evidence that its nonexistence is more probable.

(3) *Determination On Evidence Relevant to Both Basic And Presumed Facts.* When evidence as to the existence or nonexistence of the basic facts and the evidence of the nonexistence of the presumed fact is such that reasonable minds would not necessarily agree whether the existence or nonexistence of the basic facts and the nonexistence of the presumed fact is more probable than not, the judge shall submit the matter to the jury with an instruction to find the presumed fact if they find the existence of the basic facts is more probable than not but to find the nonexistence of the presumed fact notwithstanding having found the basic facts if they find the nonexistence of the presumed fact is more probable.

Under no circumstances should the foregoing analysis be considered a form of jury instruction where submission to the jury is required; it is far too complicated for that. However, it may provide a fundamental set of principles for guidance in the formulation of jury instructions.

In *Schlichting v. Schlichting*, 15 Wis. 2d 147, 157, 112 N.W.2d 149, 155 (1961), the supreme court acknowledged the need for jury instructions with respect to presumptions based upon "logic," ("reasonable inference") and referred approvingly to one of Professor Morgan's articles on such jury instructions:

> Professor McCormick recognizes the two classes of presumptions heretofore discussed. McCormick, *Evidence* (Hornbook series) p. 639, sec. 308. Furthermore, in speaking of a presumption grounded upon a reasonable inference, he states that '… the inference remains though the "presumption" has "disappeared."' *Id.*, at page 650, sec. 311. Some courts phrase it differently and speak of the necessity of weighing the presumption as evidence. *McDonald v. Hewlett* (1951), 102 Cal. App. (2d) 680, 228 Pac. (2d) 83, 24 A.L.R. (2d) 1281, 1287; *Will of Rogers*, (1907), 80 Vt. 259, 67 A. 726. Professor Morgan sets forth the manner of properly instructing a jury with respect to a presumption grounded on reasonable inference. Morgan, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 Harv. L. Rev. (1933) 59, 75.

Authors' Note. *See also* Wis. Stat. ch. 891 as to various statutory presumptions.

Case Annotations

Vanderventer v. Hyundai Motor Am., 2022 WI App 56, ¶¶ 80–81, 85–92, 405 Wis. 2d 481, 983 N.W.2d 1 (review denied).

This was a products-liability case alleging enhanced injuries as a result of a defective driver's seat. Wis. Stat. § 895.047(3)(b) states that a product's material compliance with governmental standards creates a rebuttable presumption that the product is not defective. The plaintiff offered evidence of 85 product recalls involving the same manufacturer's vehicles and components, other than the driver's seat at issue. The court of appeals affirmed the trial court's admission of the evidence to rebut the statutory presumption. The court of appeals rejected the manufacturer's argument that, under Wis. Stat. § 903.01, only evidence that the particular part was defective may be admitted to rebut the presumption. The rules of relevance and unfair prejudice in Wis. Stat. §§ 904.01 and 904.03 may also be used to determine admissibility of evidence offered to rebut the presumption.

Bonstores Realty One, LLC v. City of Wauwatosa, 2013 WI App 131, ¶¶ 10–11, 351 Wis. 2d 439, 839 N.W.2d 893.

To overcome the statutory presumption that a municipal assessor's valuation of property is correct under Wis. Stat. § 70.49(2), the party opposing the presumption must convince the court that it is more probable than not that the assessed value was incorrect.

Russ v. Russ, 2007 WI 83, ¶¶ 31, 36, 40, 302 Wis. 2d 264, 734 N.W.2d 874.

In a breach-of-fiduciary-duty action against an agent under a financial power of attorney (POA), the creation of a joint account before the execution of the POA creates a presumption of donor intent that conflicts with the presumption of fraud created when the POA agent transfers funds from the joint account for the agent's own use. To resolve this conflict, the court is free to make a determination based on the facts and the credibility of the witnesses. Extrinsic evidence may be admitted to determine the intent of the parties.

Marine Bank v. Taz's Trucking, Inc. (In re Modern Bldg. Materials Inc.), 2005 WI 65, ¶¶ 28–32, 281 Wis. 2d 275, 697 N.W.2d 90.

A contract action brought for unpaid freight charges raised conflicting rebuttable common-law presumptions as to whether the consignor or consignee was liable for the charges. This situation required the trier of fact to weigh the evidence regarding the facts from which those presumptions arose.

Beecher v. LIRC, 2004 WI 88, ¶¶ 53–54, 273 Wis. 2d 136, 682 N.W.2d 29.

The burden-shifting framework for worker's compensation cases invoking the odd-lot doctrine, under *Balczewski v. DILHR*, 76 Wis. 2d 487, 251 N.W.2d 794 (1977), can be analogized to the law of presumptions in civil cases. The claimant has the burden to make a prima facie case for odd-lot unemployability based on the claimant's injury, age, education, training, and capacity. The burden of persuasion then shifts to the employer to show that there exists suitable employment for the claimant, which the employer can meet by bringing forth evidence of actual job availability, making it more probable than not that the claimant is capable of earning a living.

DiBenedetto v. Jaskolski (In re Est. of Thompson), 2003 WI App 70, ¶ 15, 261 Wis. 2d 723, 661 N.W.2d 869.

Proof of the existence and authenticity of a birth certificate is prima facie evidence that the individual named in the certificate was the marital child of the person listed as the father in the certificate, thus shifting the burden to another party to establish the nonexistence of this fact.

State v. Johnson, 2000 WI 12, ¶¶ 33–46, 232 Wis. 2d 679, 605 N.W.2d 846.

A prosecutor's decision to bring additional charges following a mistrial caused by a hung jury does not give rise to a rebuttable presumption of prosecutorial vindictiveness, since there is no realistic likelihood that the state is retaliatory against a protected right.

Sallie T. v. Milwaukee Cnty. of Health & Hum. Servs. (In re Nadia S.), 219 Wis. 2d 296, 311, 581 N.W.2d 182 (1998), *overruled in part on other grounds by Village of Trempealeau v. Mikrut*, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190.

Compliance with the conditions of a dispositional order for a child in need of protection or services (CHIPS) does not create a presumption that it is in the child's best interests to be returned to the biological parents.

Currie v. DILHR, 210 Wis. 2d 380, 389–94, 565 N.W.2d 253 (Ct. App. 1997).

Wis. Stat. § 903.01 does not determine whether a party is entitled to a presumption. The presumption must be recognized at common law or be created by statute. Wisconsin courts have adopted the federal Title VII framework for allocating burdens and the order of presentation of proof in Wisconsin Fair Employment Act discrimination suits. In such actions, a prima facie case will trigger an intermediate burden of production for the employer. However, unless the employer fails to present any evidence of a nondiscriminatory motive, the complainant continues to bear the burden of proof on the ultimate issue of discrimination.

Odd S.-G. v. Carolyn S.G. (In re Kyle S.-G.), 194 Wis. 2d 365, 374, 533 N.W.2d 794 (1995).

The party relying on the presumption has the burden of proving the basic facts. The term *burden* as used in Wis. Stat. § 903.01 refers to the burdens of both production and persuasion. Once the basic facts are found to exist, the burdens of persuasion and production shift to the party opposing the presumption. That party then bears the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

Authors' Note. How does one know that the party having the burden of proving the basic facts has "convinced the jury of their existence" so that the burdens of persuasion and production have shifted to the opposing party to prove the nonexistence of the presumed facts? See quoted language at 194 Wis. 2d at 374. On a motion to dismiss, the judge may have to determine whether the proponent has presented sufficient evidence for a reasonable jury to be so convinced. Final instructions will have to be carefully crafted to inform the jury of the burden and when it shifts.

State ex rel. Flores v. State, 183 Wis. 2d 587, 613, 516 N.W.2d 362 (1994).

Evidence of the mailing of a letter creates a rebuttable presumption that the letter was delivered and received. Such a presumption shifts to the challenging party the burden of presenting credible evidence of nonreceipt. The presumption may not be given conclusive effect without violating the Due Process Clause. If the defendant denies receiving the letter, the rebuttable presumption is spent and a question of fact is raised so that the issue is one of credibility for the fact-finder. Once the presumption of mailing has been credited, then the presumption may not be overcome without a denial of receipt.

State v. J.L.T. (In re Paternity of M.A.V.), 149 Wis. 2d 548, 553 & n.4, 439 N.W.2d 829 (Ct. App. 1989).

It does not matter whether a presumption is based on logic and reasonable inference or on a policy objective; in either case, upon proof of the "basic facts," both the evidentiary burden of production and the burden of persuasion are shifted to the party against whom the presumption is directed. Wisconsin does not use the "bursting bubble" theory of presumptions.

Kruse v. Horlamus Indus., 130 Wis. 2d 357, 365–66, 387 N.W.2d 64 (1986).

Presumptions do not "disappear" or "burst" when evidence to the contrary of the presumed fact is introduced; even when rebutting evidence has been produced, the inference from the presumption survives and is sufficient to support a jury verdict until the presumption is met by evidence of equal weight.

Implicit in this rule is a uniform quantum of proof for every presumption. All presumptions at common law and all statutory presumptions that do not express a quantum of proof require proof to the "greater weight of the credible evidence."

State v. Bauer, 123 Wis. 2d 444, 451–52, 368 N.W.2d 59 (Ct. App. 1985).

In a criminal case in which the state has lost or discarded evidence within its exclusive possession without first determining whether it was exculpatory, an irrebuttable presumption is created that it was exculpatory, and the court may consider appropriate sanctions.

Authors' Note. The supreme court in *State v. Bauer*, 127 Wis. 2d 125, 377 N.W.2d 175 (1985), vacated the above decision because the photographs were found.

Mushel v. Town of Molitor, 123 Wis. 2d 136, 141, 365 N.W.2d 622 (Ct. App. 1985).

The fact that a road leads to a navigable lake, as opposed to some other destination, does not give rise to a presumption that the road is public. A presumption of public ownership places too rigorous a burden on the landowner, who would then have to prove the nonexistence of the presumed fact is more probable than its existence.

State v. Frankenthal, 113 Wis. 2d 269, 272, 335 N.W.2d 890 (Ct. App. 1983).
There is a prima facie presumption of the accuracy of a VASCAR (Visual Average Speed Computer and Recorder) speed reading. It is unnecessary to present expert testimony as to the accuracy, reliability, and scientific principles on which the unit was based in order to admit the reading.

Westfall v. Kottke, 110 Wis. 2d 86, 113, 328 N.W.2d 481 (1983).
It was error for a court to refuse to explain the effect of a presumption.

Brooks v. Steffes (In re Est. of Steffes), 95 Wis. 2d 490, 501, 290 N.W.2d 697 (1980).
If there is a close marriage relationship, the law presumes that services are performed gratuitously, and the law will not imply from the mere rendition of services by one family member to another a promise to pay. The presumption is rebuttable.

First Nat'l Bank v. Nennig, 92 Wis. 2d 518, 529–30, 285 N.W.2d 614 (1979).
The law presumes that every person is competent until satisfactory proof to the contrary is presented.

Paulsen Lumber, Inc. v. Anderson, 91 Wis. 2d 692, 699, 283 N.W.2d 580 (1979).
The inference that can be drawn from a failure to produce a witness or evidence cannot, alone, sustain the plaintiff's burden as to that issue. The plaintiff must also produce some affirmative evidence before the inference is available to the plaintiff.

Genova v. State, 91 Wis. 2d 595, 607–08, 283 N.W.2d 483 (Ct. App. 1979).
A distinction exists between civil presumptions and "criminal presumptions." A "criminal presumption" is not a presumption at all but only a permissive inference that is a finding of fact and may be grounded on circumstantial evidence. Presumptions and permissive inferences are procedural tools that enable a plaintiff to survive a motion to dismiss or, on review, establish a circumstantial sufficiency of the evidence to justify a predicate fact. A permissive inference is a court-approved logical relationship that establishes the sufficiency of the circumstantial evidence of an inferred fact. A presumption in a civil case is grounded on logical relationships or policy or both of the presumed fact. The policy involved in the presumption is supplied by either the common law or statute or both.

Thompson v. Allaert (In re Est. of Haese), 80 Wis. 2d 285, 298, 259 N.W.2d 54 (1977).
The testator is presumed to be aware of the law at the time the will is executed.

State v. Collova, 79 Wis. 2d 473, 487 n.9, 255 N.W.2d 581 (1977).
It is presumed that a letter properly mailed was received.

Malnar v. Stimac (In re Est. of Malnar), 73 Wis. 2d 192, 199, 243 N.W.2d 435 (1976).
The testator is presumed to understand the contents of a duly executed will. Once due execution is shown, the burden of persuasion shifts to the opponent.

Herro v. DNR, 67 Wis. 2d 407, 426, 227 N.W.2d 456 (1975).
Governmental agencies are presumed to comply with the law unless evidence is introduced to the contrary.

Chapter 6
In Criminal Proceedings

903.03 Presumptions in criminal cases.
(1) Scope. Except as otherwise provided by statute, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(2) Submission to jury. The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

(3) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

Judicial Council Committee's Note (1974)

Sub. (1). In Wisconsin, presumptions in criminal cases are "permissive" in their procedural effect. McCormick ss. 308, 309. Thus, the jury may but is not required to infer the presumed fact from the basic fact. A permissive presumption is tantamount to a permissible inference. "Basing a finding of fact on an inference is nothing more than grounding such a finding on circumstantial evidence. *Cf. Ryan v. Zweck-Wollenberg Co.*, 266 Wis. 630, 647, 64 N.W.2d 226 (1954)." *Schlichting v. Schlichting*, 15 Wis. 2d 147, 157, 112 N.W.2d 149, 155 (1961). The effect of a presumption in a criminal case in Wisconsin is akin to the permissible inference theory of res ipsa loquitur in Wisconsin wherein a (presumed) fact may be inferred from the basic fact (circumstantial evidence). In Wisconsin criminal cases the common law presumptions of sanity (Wis. J.I.–Criminal 645), that a reasonable person intends the natural consequences of his acts (Wis. J.I.–Criminal 1102, 1220, 1441), and the continuance of life (Wis. J.I.–Criminal 1125) are illustrative of the treatment of presumptions. The jury is informed: (1) the law presumes the fact; (2) the presumption is rebuttal; (3) the rebuttal may be by "circumstance" (direct or circumstantial evidence); (4) the presumed fact and the basic facts must be proved by the criminal quantum of proof. *State v. Davidson*, 44 Wis. 2d 177, 191–92, 170 N.W.2d 755, 762–63 (1969); *State v. Gresens*, 40 Wis. 2d 179, 185, 161 N.W.2d 245, 248 (1968); *Winburn v. State*, 32 Wis. 2d 152, 165, 145 N.W.2d 178, 184 (1966); *Williamson v. State*, 31 Wis. 2d 677, 682, 143 N.W.2d 486, 488–89 (1966); *State v. Carlson*, 5 Wis. 2d 595, 604–05, 93 N.W.2d 354, 359–60 (1959); *State v. Schweider*, 5 Wis. 2d 627, 636, 94 N.W.2d 154, 159–60 (1959); *State v. Vinson*, 269 Wis. 305, 309e, 70 N.W.2d 1, 4 (1955); *Smith v. State*, 248 Wis. 399, 404, 21 N.W.2d 662, 664 (1946); *State v. Wiedenfeld*, 229 Wis. 563, 568, 282 N.W. 621, 623–24 (1938).

Statutory inferences, including those which on their face seem to have more than the effect of a permissible inference, are treated in the same fashion as common law presumptions. Like the common law presumptions, statutory presumptions have only the effect of a permissible inference. *Kruetzer v. Westfahl*, 187 Wis. 463, 478, 204 N.W. 595, 601 (1925); *McCool v. State*, 51 Wis. 2d 528, 530, 187 N.W.2d 206, 207 (1971); *State ex rel. Schopf v. Schubert*, 45 Wis. 2d 644, 648, 173 N.W.2d 673, 675 (1970); *State v. Schoffner*, 31 Wis. 2d 412, 425, 143 N.W.2d 458, 463–64 (1966); *State v. Esser*, 16 Wis. 2d 567, 588, 115 N.W.2d 505, 516 (1962); Note, *Criminal Law—Burden of Proof for Insanity Defense*, 1969 Wis. L. Rev. 969. Statutory presumptions of "possession" and possession "for offensive and aggressive use" with respect to a machine gun, ss. 164.04 and 164.05; that the sale of intoxicating liquor is the principal business of premises licensed as a tavern and a restaurant, s. 176.32(1); and that a recorded or recordable conveyance or proof of possession is presumptive evidence of title in a criminal case, s. 891.36, have not been interpreted in reported cases. The most they can do under this rule is to permit the jury to find the presumed fact.

Subs. (2) and (3). There are two basic problems involved in relation to a statutory prima facie evidence provision such as is contained in s. 325.235 (1959) (885.235 (1969)):

(1) The first problem relates to when there is sufficient evidence to send the case to the jury. The usual rule is that, if a fact is made prima facie evidence of the existence of another fact, and there is evidence from which a reasonable man could find the existence of the basic fact, that judge must submit the issue the jury. Wigmore says: The sufficiency of evidence to go to the jury (the significance of which is that the proponent is no longer liable to a non-suit or to the direction of the verdict for the opponent) is also often referred to as a prima facie case. (Wigmore Vol. IX ss. 2494).

Thus, if there is evidence from which the jury can find the blood tested was .15% or more by weight of alcohol and that there was evidence of physical corroboration, the judge must submit the case to the jury (assuming of course that there is evidence by which the jury can find that, while in this condition, defendant operated a motor vehicle or handled a firearm).

(2) The second problem, and one which relates directly to the issue of instructions, is whether the judge, having decided to submit the case to the jury, should also instruct the jury on the effect of the statutory prima facie case. There appears to be no settled law on this question. The proposed instruction proceeds on the assumption that it is proper and desirable for the judge to tell the jury that the legislature has provided that they may find the person guilty of being under the influence of an intoxicant based upon the finding that his blood alcohol was .15% or more by

weight plus corroborating physical evidence, but that they need not do so unless they are satisfied, upon all of the evidence, of his guilt beyond a reasonable doubt.

Comment to Wis. J.I.–Criminal 230.

The following quotations summarize the judicial function in reference to dismissal or a directed verdict of acquittal.

> It is the function of the trial court in a lawsuit, whether civil or criminal, to appraise the evidence at various intervals during the trial for the purpose of ascertaining whether it is sufficient to warrant submission to and consideration by the tribunal. Since there can be no direction of a verdict against defendant in a criminal case the trial court can direct a verdict only against the state.
>
> If the trial court rules the evidence insufficient to support the finding of guilt and consequently declines either to consider the case on the merits or to submit it to a jury, the rulings are reviewable because the court acts, not as the ultimate tribunal deciding the case upon the merits, but as a trial court deciding procedural questions … —*State v. Evjue*, 254 Wis. 581, 589–92, 37 N.W.2d 50, 54–55 (1949).
>
> The test of the sufficiency of the evidence to sustain a motion for a directed verdict is the same as a motion to dismiss. Both are addressed to the legal proposition of whether the evidence taken most favorably against the accused is sufficient to support a finding of guilt beyond a reasonable doubt. *Welsher v. State*, 28 Wis. 2d 160, 135 N.W.2d 849 (1965); 23A C.J.S., *Criminal Law*, p. 361, s. 1145(3). We have pointed out that the test beyond a reasonable doubt does not exclude every possible doubt but is that moral certainty which 'is a reasonable certitude or conviction based on convincing reasons and excludes all doubts that a contrary or opposite conclusion can exist based on any reasons. One having such a state of mind is said to be convinced beyond a reasonable doubt.' *State v. Johnson*, 11 Wis. 2d 130, 135, 136, 104 N.W.2d 379 (1960). *See also State v. Stevens*, 26 Wis. 2d 451, 132 N.W.2d 502 (1965). *State v. Gresens*, 40 Wis. 2d 179, 181–82, 161 N.W.2d 245, 246 (1968).
>
> An accurate statement of the rule for testing the sufficiency of the evidence on a motion to dismiss, as well as on appeal, is 'whether the evidence adduced, believed and rationally considered by the jury, was sufficient to prove the defendant's guilt beyond a reasonable doubt'…. This test has been phrased as in civil cases in shorthand form, 'any credible evidence to sustain the verdict,' but this must be understood to mean in a criminal case credible evidence sufficient to convince a jury beyond a reasonable doubt.
>
> In discussing the application of this test to cases resting upon circumstantial evidence, this court cited an earlier formulation, with approval, as follows:
>
> '… *Kollock v. State*, 88 Wis. 663, 60 N.W. 817 (1894), states the principles applicable to circumstantial evidence to be: 1. That each of the several circumstances upon which the conclusion of guilt necessarily depends must be proved beyond a reasonable doubt; and 2. They must not only point with moral certainty to the guilt of the defendant, but must exclude to a moral certainty every other reasonable hypothesis. The rule does not require the exclusion of all other possible hypotheses or even probabilities, but only reasonable hypotheses if innocence.'

Welsher v. State, 28 Wis. 2d 160, 166, 135 N.W.2d 849, 852 (1965).

The last sentence of s. 903.03(2) permits the submission to the jury of a presumed fact which is not an element of the offense or negatives the defense although the basic facts are not established beyond a reasonable doubt, but merely by substantial evidence. Wisconsin law is not clear with respect to whether in a criminal case all the facts or only the facts which are essential elements of the crime must be proved beyond a reasonable doubt. Thus, the third sentence may change the law in Wisconsin. S. 903.03 makes no other change in Wisconsin law.

The phraseology of subs. (2) and (3) with reference to submission of the existence of a presumed fact to the jury does not require nor suggest the use of a special verdict or a general verdict with a finding of fact although there appears to be no prohibition to the use of a special verdict in a criminal case. Such phraseology suggests that the jury is to be informed of the presumption by an appropriate jury instruction.

Case Annotations

(1) Scope

State v. Busch, 217 Wis. 2d 429, 443–44, 448, 576 N.W.2d 904 (1998).

A recognized method of testing authorized by statute is entitled to a prima facie presumption of accuracy. If a breath alcohol instrument's method of testing has been recognized as accurate and in compliance with Wis. Stat. § 343.305(6)(b) and Wis. Admin. Code § Trans 311.04, it is afforded a presumption that its results are accurate and reliable. When a method of testing has been recognized as accurate and reliable, a particular breath test instrument that uses an identical method need not be proved for reliability in every case.

Here, the court determined that the method used by the Intoxilyzer Model 5000 Series 6600 was identical to the method used by an earlier series of the same model, which had previously been evaluated and recognized as accurate and reliable. Therefore, the court held that the results of the Series 6600 should also enjoy a presumption of accuracy and reliability, even though that machine had not been separately evaluated.

State v. Vick, 104 Wis. 2d 678, 693, 312 N.W.2d 489 (1981).

There are two types of presumptions: permissive and mandatory. A permissive presumption, or permissive inference, allows, but does not require, the trier of fact to find an element of the crime (elemental fact) upon proof by the prosecution of another fact (basic fact), and it places no burden of any kind on the defendant. It leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof.

A mandatory presumption requires that the trier of fact find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumption.

(2) Submission to Jury

(3) Instructing the Jury

State v. Schultz, 2007 WI App 257, ¶¶ 8–23, 306 Wis. 2d 598, 743 N.W.2d 823; ***State v. Jensen***, 2007 WI App 256, ¶¶ 10–22, 306 Wis. 2d 572, 743 N.W.2d 468.

Jury instructions in a criminal case cannot effectively direct a jury to find factual or legal elements that are essential to the determination of guilt. A jury must be free to reach its own decisions on all findings essential to a conviction. In criminal cases involving proof of presumed facts, the court must instruct the jury that while it may regard the basic facts, if proved beyond a reasonable doubt, as evidence of the presumed fact, it is not required to do so.

State v. Dyess, 124 Wis. 2d 525, 536, 370 N.W.2d 222 (1985).

In a negligent homicide case, it was error to instruct the jury that if the defendant violated the speed limit, then the defendant was negligent, because negligence is a presumed fact necessary to support a conviction. In criminal cases, a judge cannot direct the jury to find a presumed fact. Instead, a permissive inference instruction is required.

Chapter 7
General

904.01 Definition of "relevant evidence".

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Judicial Council Committee's Note (1974)

This section is consistent with recent Wisconsin cases, *State v. Becker*, 51 Wis. 2d 659,188 N.W.2d 449 (1971), *State v. Heidelbach*, 49 Wis. 2d 350, 182 N.W.2d 497 (1971), *Zebrowski v. State*, 50 Wis. 2d 715, 185 N.W.2d 545 (1971), *Rausch v. Buisse*, 33 Wis. 2d 154, 146 N.W.2d 801 (1966). "Any evidence that assists in getting at the truth of the issue is relevant; in other words, any fact which tends to prove a material issue is relevant, even though it is only a link in the chain of facts which must be proved to make the proposition at issue appear more or less probable.…" *Oseman v. State*, 32 Wis. 2d 523, 526, 145 N.W.2d 766, 768–69 (1966). In *Zdiarstek v. State*, 53 Wis. 2d 420, 428, 192 N.W.2d 833, 837 (1972), the *Oseman* case was quoted: "[t]he criterion of relevancy is whether or not the evidence adduced tends to cast any light upon the subject of the inquiry." *State v. Becker*, *supra*, adopted McCormick's view of the distinction between materiality and relevancy which is imported into s. 904.01 by the phrase "that is of consequence to the determination of the action." In addition, the adoption of Rule 303 of the American Law Institute Model Code of Evidence, *Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967), *certiorari denied* 88 S.Ct. 1056, 390 U.S. 959, 19 L.Ed.2d 1155, and its enthusiastic application in subsequent cases, support a broad definition of relevancy because the necessary tool is supplied to eliminate undue prejudice, confusion or delay that might result from "remoteness." The latter is a shorthand expression of the concept that evidence is either irrelevant or its probative value is outweighed by considerations of prejudice, confusion or delay. *Dahl v. K-Mart*, 46 Wis. 2d 605, 176 N.W.2d 342 (1970); *Krause v. Milwaukee Mut. Ins. Co.*, 44 Wis. 2d 590, 172 N.W.2d 181 (1969); *Neider v. Spoehr*, 41 Wis. 2d 610, 165 N.W.2d 171 (1969). The combined application of ss. 904.01 to 904.03 in establishing a broad definition of relevancy is limited by ss. 904.04 to 904.11 which have been evolved for particular situations.

Authors' Note. *See* Wis. Stat. § 885.23 (making genetic test relevant in any civil case when exclusion from parentage is established or when probability of parentage is shown to exist; fact that person refuses to submit to court-ordered genetic tests is relevant evidence that must be received at trial); *see also* Wis. Stat. § 767.84 ("Genetic tests in paternity actions").

Case Annotations

Authors' Note. Case annotations relating to Wis. Stat. ch. 904 are arranged as follows. Cases defining relevance are included under Wis. Stat. § 904.01, cases that found specific evidence to be relevant or irrelevant are included under Wis. Stat. § 904.02, and cases that discuss the balancing test are included under Wis. Stat. § 904.03.

Lorbiecki v. Pabst Brewing Co., 2024 WI App 33, ¶¶ 33–39, 412 Wis. 2d 641, 8 N.W.3d 821 (petition for review filed).

This lawsuit alleged that the defendant company's violations of the Wisconsin safe-place statute caused the plaintiff's injury and death from asbestos-exposure mesothelioma. The defendant, the current owner of the company since 2014, repeatedly sought to avoid responsibility for the plaintiff's injuries and death because the alleged asbestos exposure occurred several years before 2014. Nevertheless, the court held that evidence of the $700-million 2014 purchase price was relevant to show that the defendant's financial commitment reflected its understanding of the asbestos-related risks and their potential effect on the defendant's purchase of the company.

Vanderventer v. Hyundai Motor Am., 2022 WI App 56, ¶¶ 80–81, 85–92, 405 Wis. 2d 481, 983 N.W.2d 1 (review denied).

This was a products-liability case alleging enhanced injuries as a result of a defective driver's seat. Evidence of 85 product recalls involving the same manufacturer's vehicles and components, other than the driver's seat at issue, was relevant under Wis. Stat. § 904.01. The manufacturer invoked Wis. Stat. § 895.047(3)(b), which states that compliance with governmental standards creates a rebuttable presumption that the product is not defective. Thus, the effect of compliance with federal standards is a "fact that is of consequence to the determination" of the plaintiffs' claim. "The recall evidence tended to show that vehicles which comply with [federal standards] may nevertheless have safety-related defects. This, in turn, could support an inference that … satisfaction of those standards was not especially strong evidence that [the] driver's seat was not defective."

State v. Swope, 2008 WI App 175, ¶¶ 20–22, 315 Wis. 2d 120, 762 N.W.2d 725.

There are two factors of relevance. First, the evidence must relate to a fact or proposition that is of consequence to the determination of the action. Second, the evidence must have a tendency to make a consequential fact more probable or less probable than it would be without the evidence.

In this first-degree intentional homicide case, in which the causes of the simultaneous deaths of the two victims were central issues, the state's expert's testimony—that simultaneous natural-death causes were improbable—was relevant.

State v. Sullivan, 216 Wis. 2d 768, 785–86, 576 N.W.2d 30 (1998).

Relevance has two facets, requiring a court to make two related inquiries. First, does the evidence relate to a fact or proposition that is of consequence to the determination of the action? The proponent of the evidence must articulate the fact or proposition that the evidence is offered to prove. Second, does the evidence have a tendency to make a consequential fact more probable or less probable than it would without the evidence; i.e., does it have probative value?

Winnebago Cnty. v. Harold W. (In re Guardianship of Tina Marie W.), 215 Wis. 2d 523, 536–37, 573 N.W.2d 207 (Ct. App. 1997).

Relevance is an "elastic concept" that must be assessed in light of the nature of the proceedings. Evidence that might not be relevant in a criminal proceeding may be in a civil proceeding. What is relevant depends on the issue. Here, the issue of a father's prior sexually inappropriate conduct was relevant to whether he was suitable to continue serving as his incompetent, adult daughter's coguardian, even though not all the evidence directly involved allegations that he was sexually inappropriate with the daughter.

State v. Alexander, 214 Wis. 2d 628, 641–45, 651, 571 N.W.2d 662 (1997).

Relevant evidence is evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probable. By this test, in a prosecution for operating a motor vehicle with a prohibited alcohol concentration, in violation of Wis. Stat. § 346.63(1)(b), prior convictions, suspensions, or revocations counted under Wis. Stat. § 343.307(1) are relevant. However, such evidence is relevant only as a status element of the charged offense. When the evidence sought to be excluded goes only to this status element and the defendant admits to that element, its probative value is substantially outweighed by the danger of unfair prejudice, and the evidence is inadmissible.

State v. Heuer, 212 Wis. 2d 58, 61–62, 567 N.W.2d 638 (Ct. App. 1997).

An appellate court will not reverse a trial court's evidentiary rulings that apply the relevant law to the applicable facts and reach a reasonable conclusion. The defendant here attempted to introduce evidence that he failed to take the stand in his own defense because he was unable to articulate his ideas and he lacked long-term memory as a result of a head injury. The court observed that there "is no constitutional right to introduce irrelevant evidence," and concluded that the proffered evidence was irrelevant because it had no bearing on the defendant's guilt or innocence and made no fact of consequence to that determination more or less probable. Rather, it raised collateral issues, which were in themselves irrelevant.

State v. Richardson, 210 Wis. 2d 694, 705–08, 563 N.W.2d 899 (1997).

Relevance is to be defined broadly. Relevant evidence is generally admissible and is evidence having any tendency to make a fact of consequence to the determination more or less probable than it would be otherwise. Under this "any tendency" standard, there is a strong presumption that proffered evidence is relevant. Here, the defendant's estranged wife telephoned the defendant's divorce lawyer two days before the charged sexual assault of a minor and claimed that the defendant was having sex with a 14-year-old. Evidence of the telephone call was relevant to the defendant's frame-up defense, given the liberal rules of relevance. However, the evidence was properly excluded under Wis. Stat. § 904.03.

Nowatske v. Osterloh, 201 Wis. 2d 497, 504–07, 549 N.W.2d 256 (Ct. App. 1996).

Relevant evidence is evidence that sheds any light on the subject of the inquiry. In a medical malpractice action, evidence that two unrelated malpractice claims had been filed against the plaintiffs' expert witness did not cast light on the credibility of the expert's opinion. However, the trial court's admission of such irrelevant evidence was harmless error.

State v. Brewer, 195 Wis. 2d 295, 308–09, 536 N.W.2d 406 (Ct. App. 1995).

To be relevant, an item of proof need not prove a matter by itself; it need only be a "single link in the chain of proof." Thus, in a prosecution for possession of a controlled substance, evidence of the defendant's gang affiliation, along with other evidence, made it more probable that the defendant's home was a base of operation for drug sales.

State v. Patricia A.M., 176 Wis. 2d 542, 551, 553, 500 N.W.2d 289 (1993).

Any evidence that assists in getting at the truth of an issue is relevant; in other words, any fact that tends to prove a material issue is relevant, even though it is only a link in a chain of facts that must be proved to make the proposition appear more or less probable. Relevance is not determined by resemblance to, but by connection with, other facts.

Showing that a witness has proven credible in the past would have a tendency to make that witness's testimony at trial more believable in the eyes of a jury than the testimony would be without such evidence. Therefore, the fact that the witness's past allegations concerning sexual abuse by his father were proven credible by medical evidence was likely to make it more probable in the eyes of the jury that he was telling the truth concerning sexual abuse by his mother.

Michael R.B. v. State (In the Int. of Michael R.B.), 175 Wis. 2d 713, 724–25, 735, 499 N.W.2d 641 (1993).

To be relevant, the proffered evidence need not prove a fact in a "substantial way," but it must do more than simply afford a possible ground of suspicion against a person. The evidence must connect that other person to the crime, either directly or inferentially; "factual resemblance" alone is not enough.

Trial court judges exercise considerable discretion in deciding the extent of an inquiry in respect to bias. While evidence pertaining to a party's bias is generally relevant, the judge did not err in precluding witnesses from testifying as to personal animosities between the victim's and the defendant's families.

State v. Johnson, 149 Wis. 2d 418, 427–28, 439 N.W.2d 122 (1989), *reaff'd on reconsideration*, 153 Wis. 2d 121, 449 N.W.2d 845 (1990).

One cannot bolster a witness's credibility until the credibility is attacked. Once an attack is made, the response can be only to that specific attack. The general test is whether the bolstering evidence is logically relevant to explain the impeaching fact.

The rehabilitating facts must meet a particular method of impeachment with relative directness. Therefore, evidence that the victim was not pursuing a civil action against the defendant was inadmissible to bolster the victim's credibility when there was no specific attack about a civil lawsuit.

Leciejewski v. Sedlak, 110 Wis. 2d 337, 345, 329 N.W.2d 233 (Ct. App. 1982), *aff'd*, 116 Wis. 2d 629, 342 N.W.2d 734 (1984).

The fact that evidence is offered for impeachment purposes does not make it relevant in and of itself. A witness cannot be impeached on collateral issues, and evidence impeaching on such issues is not relevant.

904.02 Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

Judicial Council Committee's Note (1974)

The change merely makes the rule subject to state rather than federal enactments. The method of approach of these Rules is generally to leave evidence rules that have their origins in constitutional impermissibility in the field of constitutional law. Similarly, evidence rules that originate by statute are unchanged except as recommended and effectuated in connection with the promulgation of Chs. 901 to 911. The breadth of statutory treatment of "Evidence" is best illustrated by the devotion to the subject of three pages of the index to the statutes.

Case Annotations

Authors' Note. Case annotations relating to Wis. Stat. ch. 904 are arranged as follows. Cases defining relevance are included under Wis. Stat. § 904.01, cases that found specific evidence to be relevant or irrelevant are included under Wis. Stat. § 904.02, and cases that discuss the balancing test are included under Wis. Stat. § 904.03.

State v. Griffin, 2019 WI App 49, ¶¶ 7–17, 388 Wis. 2d 581, 933 N.W.2d 681.

The court correctly excluded evidence that another person was the perpetrator of the crime when the defendant failed to establish the third prong of the *Denny* "legitimate tendency" test, i.e., that the other person had a direct connection to the crime. *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

State v. Raczka, 2018 WI App 3, ¶ 18, 379 Wis. 2d 720, 906 N.W.2d 722.

A criminal defendant, charged with recklessly causing the death of a passenger in a vehicle he was operating, sought to introduce evidence that the accident was caused by a seizure, not reckless conduct. Such evidence tends to negate the element of recklessness and is, therefore, relevant.

State v. Schmidt, 2016 WI App 45, ¶¶ 76–84, 370 Wis. 2d 139, 884 N.W.2d 510.

Expert testimony, which would otherwise be admissible under Wis. Stat. § 907.02(1), should be excluded if it does not meet the basic relevance requirements for a particular case. Testimony of a psychiatrist with expertise regarding influences of suggestive interview techniques on a child's memory was properly excluded when the proponent could not show that the police had used suggestive techniques with a child witness in the case.

State v. Hull, 2015 WI App 46, ¶¶ 30, 33, 363 Wis. 2d 603, 867 N.W.2d 419.

At a preliminary hearing in a child sexual assault case, the circuit court commissioner properly precluded the defendant from calling the victim as a witness because the testimony would have challenged the weight and credibility of the state's evidence rather than the plausibility of the state's witnesses' accounts or the probability of a felony having been committed.

State v. Going Places Travel Corp., 2015 WI App 42, ¶ 33, 362 Wis. 2d 414, 864 N.W.2d 885.

An expert opinion regarding restitution was not relevant because the proffered evidence was too general in nature, failing to cite specific figures or connect the expert's opinions to the facts of the case.

State v. Jackson, 2014 WI 4, ¶ 59, 352 Wis. 2d 249, 841 N.W.2d 791.

In a prosecution for second-degree reckless homicide by use of a dangerous weapon, evidence of the alleged victim's prior acts of violence was not relevant to the defendant's self-defense claim under Wis. Stat. § 904.01, and therefore was inadmissible under Wis. Stat. § 904.04(2). Because the defendant was unaware of the victim's past violent acts at the time of the incident, the reasonableness of the defendant's belief that he was facing a threat of "imminent death or great bodily harm" was not affected by the prior acts.

Weborg v. Jenny, 2012 WI 67, ¶¶ 7, 57, 64–69, 341 Wis. 2d 668, 816 N.W.2d 191.

In a medical malpractice action, evidence of collateral source payments may be relevant to the jury's determination of the reasonable value of medical services. *Weborg* relied heavily on *Lagerstrom v. Myrtle Werth Hospital-Mayo Health System*, 2005 WI 124, ¶ 76, 285 Wis. 2d 1, 700 N.W.2d 201.

State v. Jacobs, 2012 WI App 104, ¶¶ 12–13, 26–27, 344 Wis. 2d 142, 822 N.W.2d 885.

In a prosecution for homicide by use of a motor vehicle with a prohibited alcohol concentration, the victim's mother's testimony as to the victim's character and personal history was not relevant.

If evidence fails the test of relevance, there is no further admissibility analysis to consider. Satisfaction of a hearsay exception, for example, does not somehow make irrelevant evidence admissible.

Dalka v. Wisconsin Cent., Ltd., 2012 WI App 22, ¶¶ 32–38, 339 Wis. 2d 361, 811 N.W.2d 834.

Evidence of lack of security at a railyard was relevant to the foreseeability of a trespass resulting in injury to a railroad employee.

Evidence of a railroad company's providing handouts and bulletins to its employees touting its awareness of trespassers and the dangers they pose was relevant to the foreseeability of a trespass resulting in injury to a railroad employee.

260 N. 12th St., LLC v. DOT, 2011 WI 103, ¶ 7, 338 Wis. 2d 34, 808 N.W.2d 372.

Evidence of contamination and related remediation costs is admissible to assist the jury in considering the value of property in a condemnation proceeding, subject to the circuit court's broad discretion.

State v. Avery, 2011 WI App 124, ¶¶ 40–50, 337 Wis. 2d 351, 804 N.W.2d 216.

For "legitimate tendency" evidence to be admissible, a criminal defendant must show that a third party had (1) a motive, (2) an opportunity to commit the charged offense, and (3) a direct connection to the offense. The defendant's proffered evidence of third-party opportunity and direct connection is not relevant in the absence of motive.

Heuser v. Community Ins. Corp., 2009 WI App 151, ¶¶ 16–19, 321 Wis. 2d 729, 774 N.W.2d 653.

In a case that considered whether a teacher fulfilled her duty to refrain from acts that might unreasonably threaten her students, evidence of what the teacher did and did not instruct and demonstrate was relevant to whether the teacher satisfied her duty to warn.

State v. Payano, 2009 WI 86, ¶¶ 3, 67–79, 81, 320 Wis. 2d 348, 768 N.W.2d 832.

In a criminal prosecution for causing reckless injury with a dangerous weapon, it was not error to admit an informant's testimony that, while at the defendant's apartment the day before the alleged offense, the informant observed the defendant packaging cocaine and saw a gun on a table next to the defendant. The prosecution advanced the informant's testimony to show context for the presence of the police (executing a no-knock search warrant), to establish a motive for the defendant to shoot (gaining time to dispose of drugs), and to negate the claim of self-defense. The defendant testified that, in defense of himself and his family, he fired a gun into the entry door of his apartment while people were attempting to break it down from the outside. He argued that the informant's testimony about the drug activity of the previous day unfairly tainted his character by portraying him to be a drug dealer.

A relevance determination must answer two questions:

1. Is the proposition for which the evidence is offered of "consequence to the determination of the action?"
2. Does the evidence have probative value when offered for that purpose?

In this instance, the informant's testimony was relevant. The proposition that was of consequence to the determination of the action was the reasonableness of the defendant's belief that he was acting in self-defense when he shot into the door. The alleged presence of cocaine at his residence the day before the shooting made more probable the state's position that he fired to deter the police from entering so he would have time to get rid of drugs.

Probative value reflects the evidence's degree of relevance. Evidence highly relevant has great probative value. The crucial issue at trial was the defendant's state of mind at the time of the shooting.

State v. Doss, 2008 WI 93, ¶¶ 72–77, 312 Wis. 2d 570, 754 N.W.2d 150.

In this criminal case in which the defendant was accused of unlawfully retaining funds from her father's estate, evidence that the Department of Revenue had earlier mailed a civil complaint to the defendant seeking, among other remedies, the payment of past-due income taxes from the assets of the estate for which she was personal representative, was relevant to show that she knew about the lawsuit and acted consistently with that knowledge.

State v. Jensen, 2007 WI App 256, ¶¶ 35–38, 306 Wis. 2d 572, 743 N.W.2d 468.

In a criminal prosecution for intentional misuse of a public position to obtain a dishonest advantage by using state resources for campaign purposes, the defendant, a state legislator, could testify about his understanding of the use of state resources for campaigns by other legislators because it was relevant to the contested issue of the defendant's intent. What other witnesses believed was the practice was not relevant.

State v. Burton, 2007 WI App 237, ¶¶ 13–17, 306 Wis. 2d 403, 743 N.W.2d 152.

A person's gang affiliation is relevant to show bias on the part of the person only when there is a "tight fit" between the gang affiliation and some specific motivation to be untruthful.

State v. Campbell, 2006 WI 99, ¶¶ 33–35, 294 Wis. 2d 100, 718 N.W.2d 649.

In a criminal case for parental interference with the custody of a child, a collateral attack on the family court's custody order is relevant only if it would tend to negate an element of the crime or raise an affirmative defense.

State v. Mark (In re Commitment of Mark), 2006 WI 78, ¶¶ 35–41, 292 Wis. 2d 1, 718 N.W.2d 90.

In a Wis. Stat. ch. 980 proceeding, evidence of the conditions of the respondent's probation supervision was irrelevant to the determination whether he was a sexually violent person.

State v. Davis, 2006 WI App 23, ¶¶ 23–30, 289 Wis. 2d 398, 710 N.W.2d 514.

In a prosecution for several burglaries, evidence that one of the burglary victims had previously misidentified the defendant as the perpetrator was relevant to showing that the charged offenses were committed by someone other than the defendant.

State v. Jadowski, 2004 WI 68, ¶ 31, 272 Wis. 2d 418, 680 N.W.2d 810.

Because the court concluded that a defense predicated on a child's intentional misrepresentation of her age was precluded in a prosecution for sexual intercourse with a minor, evidence regarding that defense was not relevant and was inadmissible.

State v. Pfaff, 2004 WI App 31, ¶¶ 29–31, 36–37, 269 Wis. 2d 786, 676 N.W.2d 562.

An offer to take a polygraph test that originates with the defendant and is accompanied by defendant's belief that the test result is possible, accurate, and admissible is relevant as consciousness of defendant's innocence, but not when the seeds for the idea came from the defendant's attorney.

An autopsy photo of a deceased victim's face as proof of the victim's identity and death was admissible when the photo was not particularly gory or graphic in detail.

State v. Wright, 2003 WI App 252, ¶¶ 43–45, 268 Wis. 2d 694, 673 N.W.2d 386.

In assessing relevance, the trial court must determine whether the evidence has any tendency to make the existence of any fact that is of consequence to the determination of the action any more or less probable than it would be without the evidence. Thus, when a victim identified a defendant at a lineup but then failed to identify the defendant at a preliminary hearing and the victim's testimony was then offered by the defense as evidence of the impermissible suggestiveness as to the lineup, this testimony was properly excluded when the offer of proof revealed nothing that impugned the integrity of the lineup procedure or rendered the identification of the other witnesses suspect.

State v. Ross, 2003 WI App 27, ¶ 37, 260 Wis. 2d 291, 659 N.W.2d 122.

In a prosecution for violations of Wisconsin's Organized Crime Control Act (WOCCA) and securities laws, evidence of investor losses was relevant to proving a pattern of racketeering activity under WOCCA.

State v. Miller, 2002 WI App 197, ¶¶ 40, 48, 257 Wis. 2d 124, 650 N.W.2d 850.

In a prosecution for sexual exploitation by a therapist and first-degree sexual assault of a child, the testimony of a district attorney that the minor victim's mother had seemed "rather relieved" by his earlier decision not to file charges was not relevant and, if admitted, would have confused the jury.

State v. St. George, 2002 WI 50, ¶¶ 12, 23–24, 252 Wis. 2d 499, 643 N.W.2d 777.

In a case for first-degree sexual assault of a child, evidence that the five-year-old victim had previously been touched on her private parts by two other children would be relevant only if the jury might otherwise infer that the victim acquired sexual knowledge because the defendant committed the act charged. The court here found such evidence irrelevant, because the victim's testimony regarding the defendant's actions did not demonstrate age-inappropriate knowledge and therefore a jury would not infer that some sexual contact with the defendant must necessarily have occurred.

Green v. Smith & Nephew AHP, Inc., 2000 WI App 192, ¶¶ 27–29, 238 Wis. 2d 477, 617 N.W.2d 881, *aff'd*, 2001 WI 109, 245 Wis. 2d 772, 629 N.W.2d 727.

In a products-liability action against a manufacturer of latex gloves, evidence that the company that subsequently purchased the defendant's glove-making operation then changed the way it made its gloves to reduce a danger previously posed by the product was relevant. Though evidence of feasibility is not an element of a strict liability claim, it tends to show that a manufacturer not using that method has made a product that is unreasonably dangerous.

State v. Schroeder, 2000 WI App 128, ¶ 20, 237 Wis. 2d 575, 613 N.W.2d 911.

In a prosecution for possession of child pornography, evidence that the defendant subscribed to internet newsgroups named, for example, "alt.binaries.pictures.erotica.early-teens" was relevant to show that the defendant knowingly possessed child pornography.

State v. Miller, 231 Wis. 2d 447, 460–61, 605 N.W.2d 567 (Ct. App. 1999).

To be relevant, flight need not occur immediately following commission of the crime. An accused individual's flight from police three days after the original criminal episode was still probative of consciousness of guilt.

Door Cnty. Dep't of Health & Fam. Servs. v. Scott S. (In re Termination of Parental Rts. of Kristeena A.M.S.), 230 Wis. 2d 460, 469–70, 602 N.W.2d 167 (Ct. App. 1999).

In a proceeding to terminate a father's parental rights, testimony from a psychologist regarding the likelihood of the father's committing future sex offenses was relevant, because the circuit court in a previous proceeding for a child in need of protection or services (CHIPS) placed a condition on the father that he participate in a sex offender treatment program, which he failed to do. Failing to meet conditions established for the safe return of the child to the home is a specific element to be proved to terminate parental rights.

State v. DelReal, 225 Wis. 2d 565, 571–76, 593 N.W.2d 461 (Ct. App. 1999).

Evidence of whether gunshot residue tests were conducted by police and, if so, what the results were, was relevant for impeaching the reliability of the police investigation and arguing the defense's theory that the defendant did not discharge a firearm. Whether such evidence could be viewed as inconclusive affects weight, not admissibility.

State v. Petrovic, 224 Wis. 2d 477, 490–95, 592 N.W.2d 238 (Ct. App. 1999).

In a prosecution for the manufacture of a controlled substance, it was error for the trial court to permit evidence indicating that the defendant associated with a motorcycle gang. This evidence demonstrated no likelihood that the defendant would sell controlled substances to members of the motorcycle gang. However, the trial court's admission of this irrelevant evidence was only harmless error.

County of Kenosha v. C&S Mgmt., Inc., 223 Wis. 2d 373, 408–15, 588 N.W.2d 236 (1999).

In a prosecution for the sale of obscene material, a telephone survey assessing statewide community standards was not admissible when the questions in the survey did not elicit responses to materials that were "clearly akin" to the sexual activity depicted in the allegedly obscene material at issue in the case.

To be admissible, surveys that purport to gauge community standards must question respondents regarding the materials at issue in the case, or similar materials, and must be directed at determining whether the materials enjoy community acceptance.

State v. Richard A.P., 223 Wis. 2d 777, 790–92, 589 N.W.2d 674 (Ct. App. 1998).

Expert opinion testimony as to an individual's character for sexual deviance is relevant evidence, assisting a jury in determining the likelihood that an individual had sexual contact with a child.

State v. Zanelli, 223 Wis. 2d 545, 563–64, 589 N.W.2d 687 (Ct. App. 1998).

Presentence investigation reports from previous convictions describing an individual's continual sexual attraction to adolescent boys are relevant in a proceeding to determine whether the individual is a sexually violent person under Wis. Stat. ch. 980.

State v. Mayer, 220 Wis. 2d 419, 429, 583 N.W.2d 430 (Ct. App. 1998).

Expert witness testimony concerning a domestic abuse victim's propensity to recant earlier statements of physical abuse is relevant because it makes more probable the existence of the fact that the victim's recantation was not trustworthy because of psychological factors.

State v. Griffin, 220 Wis. 2d 371, 393, 584 N.W.2d 127 (Ct. App. 1998).

Although evidence that a defendant was unemployed and carrying a large amount of cash may have been relevant to whether he was selling drugs, it was not relevant to whether he was guilty of simple possession of drugs.

State v. Dodson, 219 Wis. 2d 65, 78–80, 580 N.W.2d 181 (1998).

When a criminal defendant is charged with first-degree sexual assault of a child, evidence of prior sexual intercourse by the victim may be relevant to suggest an alternative source for the state's evidence of physical injury to the victim and to provide an alternative source of the victim's sexual knowledge.

State v. Sullivan, 216 Wis. 2d 768, 785–89, 576 N.W.2d 30 (1998).

In a prosecution for a defendant's battery of his girlfriend, evidence of a prior domestic disturbance between the defendant and his former wife, which involved no physical contact, was not relevant to the issue of the defendant's intent or absence of accident in the later incident.

Winnebago Cnty. v. Harold W. (In re Guardianship of Tina Marie W.), 215 Wis. 2d 523, 536–37, 573 N.W.2d 207 (Ct. App. 1997).

Relevance is an "elastic concept" that must be assessed in light of the nature of the proceedings. Evidence that might not be relevant in a criminal proceeding may be in a civil proceeding. Here, the issue of a father's prior sexually inappropriate conduct was relevant to the issue of whether he was suitable to continue serving as his incompetent, adult daughter's coguardian, even though not all of the evidence directly involved allegations that he was sexually inappropriate with the daughter. The purpose of the proceedings here was not to determine the father's innocence

or guilt with respect to any sexual improprieties, but to determine whether the daughter's best interests would be served by his remaining her coguardian.

State v. Knighten, 212 Wis. 2d 833, 838–40, 569 N.W.2d 770 (Ct. App. 1997).

On the day of his trial for robbery by use of force, the defendant escaped for 30 minutes but was returned to the courtroom for trial. The court held that the evidence of his flight and resistance was relevant circumstantial evidence of his consciousness of guilt and thus of guilt itself.

State v. Heuer, 212 Wis. 2d 58, 61, 567 N.W.2d 638 (Ct. App. 1997).

There is no constitutional right to introduce irrelevant evidence. An accused has no right to introduce evidence that seeks to explain the accused individual's failure to take the stand. Such evidence has no bearing on guilt or innocence and makes no fact of consequence to the determination of guilt or innocence more or less probable.

State v. Richardson, 210 Wis. 2d 694, 705–08, 563 N.W.2d 899 (1997).

The defendant sought to introduce evidence that his estranged wife telephoned his divorce lawyer two days before the event that led to charges that he sexually assaulted and falsely imprisoned a minor. This evidence was held relevant to the defendant's frame-up defense because it had a tendency, "however small," to make it less probable that he assaulted the child. It was, however, properly excluded under Wis. Stat. § 904.03.

State v. Ingram, 204 Wis. 2d 177, 182–83, 554 N.W.2d 833 (Ct. App. 1996).

In a prosecution for fleeing a traffic officer, the trial court permitted evidence that the defendant was a high-risk parolee, that he had been released from prison about one month before the fleeing incident, and that his parole agent had been looking for him because the defendant had failed to keep in touch with the parole agent. The court of appeals affirmed, finding this evidence relevant to the defendant's motive and intent to flee from the police.

DeChant v. Monarch Life Ins. Co., 204 Wis. 2d 137, 152–53, 554 N.W.2d 225 (Ct. App. 1996).

When an insurance company asserted that an individual's injuries from an automobile accident were not severe, the description of the individual's wife's injuries from the same accident was relevant to aid the trier of fact.

State v. Morgan, 195 Wis. 2d 388, 422, 536 N.W.2d 425 (Ct. App. 1995).

In the guilt phase of a bifurcated trial, psychiatric and psychological testimony that the defendant suffered from posttraumatic stress disorder was irrelevant as to intent because the evidence had no tendency to make the existence of the defendant's specific intent to kill the victim more or less probable.

Bittner v. American Honda Motor Co., 194 Wis. 2d 122, 153, 533 N.W.2d 476 (1995).

In a products-liability and negligence action concerning whether an all-terrain vehicle (ATV) was defective, evidence introduced by the defendant comparing the risk of dissimilar products and activities to the risk of injury associated with ATVs was irrelevant because the comparison evidence had no tendency to make the material issues more or less probable.

Schaefer v. American Fam. Mut. Ins. Co., 192 Wis. 2d 768, 790, 531 N.W.2d 585 (1995), *aff'g* 182 Wis. 2d 380, 514 N.W.2d 16 (Ct. App. 1994).

In a wrongful death case in which loss of inheritance was an issue, evidence that the decedent owned a life insurance policy on which he had paid premiums and that had a cash surrender value at the time of his premature death was relevant to establish the decedent's propensity for thrift and saving and might be relevant to the damage computation.

State v. Bunch, 191 Wis. 2d 501, 515, 529 N.W.2d 923 (Ct. App. 1995).

In a prosecution for first-degree sexual assault of a child, evidence of a prior sexual assault of the victim by another person was not relevant to the defendant's claim that physical characteristics of the victim that her treating physician observed might have resulted from the victim's contact with the previous assailant, because these characteristics were not observed in an examination that followed the first alleged assault.

State v. Jackson, 187 Wis. 2d 431, 435–36, 523 N.W.2d 126 (Ct. App. 1994).

In a trial for first-degree reckless homicide arising from an incident in which the defendant allegedly pursued the victim in a high-speed chase until the victim's car crashed, testimony from the victim's coworker that just before the chase the victim called the witness to explain her fear of the defendant was held to be relevant to the victim's state of mind. The state's theory was that the accident would not have occurred if the victim had not feared the defendant and if she had not sped from him when he chased her.

Glassey v. Continental Ins. Co., 176 Wis. 2d 587, 606, 500 N.W.2d 295 (1993).

In a products-liability suit, the defendant laid a sufficient foundation to introduce evidence of the absence of other claims involving a product by establishing that the person who sought to testify on that subject had conducted a reasonable investigation to determine whether any such

claims had been made.

Michael R.B. v. State (In the Int. of Michael R.B.), 175 Wis. 2d 713, 731, 499 N.W.2d 641 (1993).
Evidence of a complainant's conversations with a friend was relevant to show that the complainant had an alternative source of sexual knowledge that might have led her to fabricate the story of the assault or to imitate the other child's sexual conduct on her own.

Cormican v. Larrabee, 171 Wis. 2d 309, 323, 491 N.W.2d 130 (Ct. App. 1992).
In a negligence action involving traumatic neurosis to the plaintiff following the birth of her child, the court appropriately admitted evidence concerning the child's disabilities and the mother's concern, because the jury needed the evidence to understand the psychiatric testimony.

State v. Grande, 169 Wis. 2d 422, 432, 485 N.W.2d 282 (Ct. App. 1992).
Evidence of a sexual assault was also evidence of an element of a kidnapping charge against the defendant. The sexual assault evidence was thus relevant and admissible under this section.

State v. Seigel, 163 Wis. 2d 871, 884, 472 N.W.2d 584 (Ct. App. 1991).
Evidence that an Illinois law prohibits the retail sale of fireworks made the law relevant to the question of whether the defendants engaged in wholesale or retail sales when they sold fireworks merchandise to Illinois buyers because it tended to refute the defense theory that the Illinois customers were all wholesale vendors of fireworks.

Soderlund v. Alton, 160 Wis. 2d 825, 836, 467 N.W.2d 144 (Ct. App. 1991).
In a legal malpractice suit, evidence of the client's alleged history of attempted suicide and substance abuse was relevant to the issue of damages arising from the attorney's negligence in an underlying divorce and child custody proceeding, because if the attorney had been able to prove to a jury that the client could have lost custody, the client's damages for future child support could have been significantly reduced.

State v. Walker, 154 Wis. 2d 158, 190–92, 453 N.W.2d 127 (1990).
Evidence of a crime similar to those crimes for which a criminal defendant was standing trial that occurred while he was incarcerated was properly excluded when the trial court found that the description of the alleged perpetrator did not match any description of the defendant in the cases for which he was being prosecuted.

Douglas v. Dewey, 154 Wis. 2d 451, 468–69, 453 N.W.2d 500 (Ct. App. 1990).
In an action stemming from a shallow-water diving accident at a resort in which the plaintiff sought to show the defendant's negligence through the safe-place statute, testimony by the defendant's son that in all the time he had assisted in running the resort, there had been no prior diving accidents was admissible.

State v. Amos, 153 Wis. 2d 257, 272–73, 450 N.W.2d 503 (Ct. App. 1989).
Evidence of an attempt to suborn perjury tended to show a consciousness of guilt and therefore made it more likely that the defendant committed the crime. Thus, it was relevant.

State v. DeSantis, 151 Wis. 2d 504, 507–08, 445 N.W.2d 331 (Ct. App. 1989), *rev'd*, 155 Wis. 2d 774, 456 N.W.2d 600 (1990).
A sexual assault counselor's testimony regarding the general characteristics of sexual assault victims was admissible to dispel any misconception that the complainant's calm demeanor and her reluctance to press charges were inconsistent with being a sexual assault victim.

State v. Kaster, 148 Wis. 2d 789, 799–800, 436 N.W.2d 891 (Ct. App. 1989).
The prosecution may elicit testimony regarding an agreement it has with a witness on direct examination. This is not "bolstering" as discussed in *United States v. Mazza*, 792 F.2d 1210 (1st Cir. 1986). It is nothing more than a disclosure of facts affecting credibility.

Mulhern v. Outboard Marine Corp., 146 Wis. 2d 604, 621, 432 N.W.2d 130 (Ct. App. 1988).
Tests conducted on a product that had been modified after an accident to reinstall an interlock device that was missing at the time of the accident were admissible. Pretrial experiments may be admitted if enough of the obviously important factors in the case are duplicated in the experiment and if the failure to control other possibly relevant variables is explained.

State v. Hartman, 145 Wis. 2d 1, 14–16, 426 N.W.2d 320 (1988).
In a sexual assault case, if a child is born within a time period indicating that the child could have been conceived as a result of the assault, the probability of exclusion and the paternity index are relevant to the determination of the perpetrator's identity when the statistics include the defendant as a possible father of the child. These are relevant because they go to the issue of whether the defendant assaulted the mother. However, the probability of the defendant's paternity is not admissible because it assumes the fact it is used to prove, i.e., that the defendant committed the assault.

State v. Hatch, 144 Wis. 2d 810, 818, 425 N.W.2d 27 (Ct. App. 1988).

Evidence as to the nature and extent of a victim's injuries is relevant to the defendant's intent to kill, and thus facts of the assault and of the severity of the injuries are relevant. Therefore, evidence of a shot to the victim's head at close range was relevant to show the defendant's intent in a murder case, but testimony regarding the permanent effects (chronic vegetative state) of the shooting was not relevant.

T.A.T. v. R.E.B. (In re Paternity of M.J.B.), 144 Wis. 2d 638, 650, 425 N.W.2d 404 (1988).

The probability-of-paternity statistic is conditionally relevant evidence. Evidence of the probability of paternity may be received only after competent evidence is offered to show that sexual intercourse between the mother and the alleged father occurred during the conceptive period.

State v. Pankow, 144 Wis. 2d 23, 41, 422 N.W.2d 913 (Ct. App. 1988).

Mathematical probability evidence of medically accepted rates of occurrences was not so overshadowing or confusing as to require exclusion when offered to negate a defense claim that the deaths of three infants under babysitting care in the same household within five years were the result of sudden infant death syndrome.

Bychinski v. Sentry Ins. Co., 144 Wis. 2d 17, 19, 423 N.W.2d 178 (Ct. App. 1988).

An economist's evidence showing the amount that a damages request would earn in the future if invested in an annuity contract is irrelevant. Such evidence does not establish the present value of a future sum but establishes the future value of a present sum.

State v. Brecht, 143 Wis. 2d 297, 319–21, 421 N.W.2d 96 (1988).

In a murder trial, evidence relating to the defendant's sexual orientation was relevant because there was sufficient evidence linking the defendant's lifestyle to a motive for the shooting. Although motive is not an element of any crime, it may nevertheless be a proper subject of inquiry and admissible if it meets the same standards of relevance as other evidence. On the facts of this case, the defendant's sexual orientation suggested a possible motive for the shooting.

State v. Bolstad, 124 Wis. 2d 576, 586, 370 N.W.2d 257 (1985).

A defendant's reasons for refusing to take a blood alcohol test are relevant; hence, they are admissible in a trial for driving while under the influence of an intoxicant to rebut the inference of consciousness of guilt that may be drawn from evidence of a refusal to take a mandatory test.

Helmbrecht v. St. Paul Ins. Co., 122 Wis. 2d 94, 107–08, 362 N.W.2d 118 (1985).

In a legal malpractice action, the original judge's testimony on damages was inadmissible under this section. The test for determining damages in such a case is what a reasonable judge would have awarded had representation been proper, not what the actual judge would have awarded. The risk of prejudice is great when a trial judge is called to testify.

Brantner v. Jenson, 121 Wis. 2d 658, 666, 670, 360 N.W.2d 529 (1985).

A physician's realistic prediction as to the possibility of future surgery, illness, or disability may give rise to a reasonable fear and anxiety in a person concerning the person's future health and well-being. Risk is a medical fact that may be used to establish a reasonable basis for compensable anxiety. As such, a plaintiff's testimony about conversations he had with a physician and the anxiety created by them were relevant.

State v. Hinz, 121 Wis. 2d 282, 286, 360 N.W.2d 56 (Ct. App. 1984).

A Department of Transportation chart showing concentrations of blood alcohol based on the number of drinks is relevant and admissible without the use of an expert.

State v. Denny, 120 Wis. 2d 614, 624, 357 N.W.2d 12 (Ct. App. 1984).

Evidence of motive of a person other than the defendant to commit a crime is admissible under this section, when there is a "legitimate tendency" that the other person could have committed the crime. As long as motive and opportunity have been shown and as long as there is also some evidence to directly connect the other person to the crime charged, which is not remote in time, place, or circumstances, the evidence is admissible.

State v. Winston, 120 Wis. 2d 500, 504, 355 N.W.2d 553 (Ct. App. 1984).

Evidence of an accomplice's flight after a crime is relevant, and is admissible as circumstantial evidence, if it is closely connected with the commission of a crime.

Authors' Note. The court refers to this evidence as part of the res gestae. It notes that the term has been abandoned in terms of the hearsay rule, citing *Christensen v. Economy Fire & Casualty Co.*, 77 Wis. 2d 50, 56 n.4, 252 N.W.2d 81 (1977). However, in its opinion it refers to the *res gestae* regarding circumstantial evidence that is not hearsay. The authors believe that the introduction of the use of the term res gestae in this context is inappropriate and will only serve to confuse the issue. The evidence was admissible because it was so closely connected to the entire circumstances of the crime as to be probative on the issue of guilt.

State v. Gershon, 114 Wis. 2d 8, 12, 337 N.W.2d 460 (Ct. App. 1983).

Rebuttal testimony regarding a child's prior consistent statements was admissible because it was relevant to the issue of the child's credibility. The defendant contended that the child had fabricated his story, but prior consistent statements made it more likely that the child's account at trial was true and also tended to make it less likely that his testimony was a product of preparation by the prosecution.

D.L. v. Huebner, 110 Wis. 2d 581, 619–20, 622, 329 N.W.2d 890 (1983).

Evidence of postmanufacture industry custom is relevant to prove the standard of care to which a manufacturer of a product should have adhered. Such evidence is admissible on the issue of negligence, because it may tend to prove that at the time of manufacture, an entire industry was negligent and therefore the custom of the industry did not meet the applicable standard of care.

Evidence that there have been no prior accidents or that a machine has had a good safety record is negative evidence because it negates the occurrence of an event rather than affirms it. Nonetheless, such evidence is relevant and admissible, and to exclude it is error.

State v. Alsteen, 108 Wis. 2d 723, 729, 324 N.W.2d 426 (1982).

In a sexual assault case in which consent was at issue, evidence of the defendant's prior sexual intercourse without consent with other women was held to be not relevant. *State v. Tarrell*, 74 Wis. 2d 647, 247 N.W.2d 696 (1976), was distinguished and narrowed.

State v. Wedgeworth, 100 Wis. 2d 514, 533, 302 N.W.2d 810 (1981).

A police officer's testimony that he had found guns on the premises of other drug dealers and his testimony regarding the finding of guns on the defendant's premises were relevant in a case of possession of controlled substances with intent to deliver.

State v. Albright, 98 Wis. 2d 663, 669, 298 N.W.2d 196 (Ct. App. 1980).

Evidence of a refusal to take a mandatory breathalyzer test is relevant in a prosecution for operating a motor vehicle while under the influence of an intoxicant, because it tends to show consciousness of guilt.

Rogers v. State, 93 Wis. 2d 682, 692, 287 N.W.2d 774 (1980).

The process by which the attendance of a witness at trial is procured is not probative as to the witness's credibility.

State v. Klimas, 94 Wis. 2d 288, 306, 288 N.W.2d 157 (Ct. App. 1979).

Evidence concerning a defendant's background and state of mind during an obviously stressful time in the defendant's life is irrelevant to the provocation element of a "heat of passion" defense in a second-degree murder case. Provocation must be determined under an objective test.

Sage v. State, 87 Wis. 2d 783, 788, 275 N.W.2d 705 (1979).

Whether to admit photographs as evidence is a matter within the trial court's discretion. They should be admitted if they will help the jury gain a better understanding of the material facts. They should be excluded if they are not "substantially necessary" to show material facts and will tend to create sympathy or indignation or direct the jury's attention to improper considerations.

Milenkovic v. State, 86 Wis. 2d 272, 281, 272 N.W.2d 320 (Ct. App. 1978).

Prior sexual conduct of the victim is irrelevant in a rape case.

State v. Williamson, 84 Wis. 2d 370, 383–85, 267 N.W.2d 337 (1978), *overruled on other grounds by Manson v. State*, 101 Wis. 2d 413, 304 N.W.2d 729 (1981).

Bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness had a motive to testify falsely. The extent of the inquiry with respect to that bias is a matter within the discretion of the trial court.

The fact of the bias or prejudice of a witness may be shown by a variety of circumstances, provided they are not too remote and clearly have some apparent basis tested by experience; great latitude is allowed in this respect.

In assessing whether to admit testimony regarding bias, the court must first determine whether the evidence is relevant, and then determine whether the probative effect is outweighed by its prejudicial effect.

Simpson v. State, 83 Wis. 2d 494, 511, 266 N.W.2d 270 (1978).

Evidence of threats made against the victim four months before the shooting was relevant. It is generally recognized that threats by an accused against a victim are admissible evidence in homicide prosecutions. Remoteness in time in such a case goes only to the weight of the threat as evidence.

Chart v. General Motors Corp., 80 Wis. 2d 91, 102–03, 258 N.W.2d 680 (1977).

Evidence that like products were generally free from, or subject to, defective or injurious conditions is generally admissible. However, considerable discretion is vested in the trial court as to whether introduction of such evidence would involve undue distraction or introduction of entirely collateral issues.

Chapin v. State, 78 Wis. 2d 346, 355–56, 254 N.W.2d 286 (1977).

Evidence of mental disorder or impairment may be relevant regarding credibility when it shows that the witness's mental disorganization in some way impaired the witness's capacity to observe the event at the time of its occurrence, to communicate these observations accurately and truthfully at trial, or to maintain a clear recollection of it in the meantime. Absent any of these criteria, such evidence is irrelevant.

See also ...

City of West Bend v. Wilkens, 2005 WI App 36, 278 Wis. 2d 643, 693 N.W.2d 324 (field sobriety tests are not scientific tests; their "reliability" is a jury issue, not an admissibility issue)

Hunt v. Clarendon Nat'l Ins. Serv., Inc., 2005 WI App 11, ¶¶ 18–22, 278 Wis. 2d 439, 691 N.W.2d 904 (evidence that bus company used reasonable and safe student-discharge alternatives in rural areas relevant to whether it acted negligently in discharging child subsequently hit by car in urban area)

State v. Foy, 206 Wis. 2d 629, 642–45, 557 N.W.2d 494 (Ct. App. 1996) (concluding that defense attorney's testimony about defendant's statement would be relevant to contested issue if it could be viewed as inconsistent with another witness's version of the statement)

State v. Kourtidias, 206 Wis. 2d 574, 580–83, 557 N.W.2d 858 (Ct. App. 1996) (evidence of prior incidents of child enticement relevant in prosecution brought for similar conduct)

State v. Lindvig, 205 Wis. 2d 100, 107–08, 555 N.W.2d 197 (Ct. App. 1996) (photographs of victim with arrow through leg relevant to prove bodily harm, even when defendant willing to stipulate to that element)

State v. Mark A. (In re Paternity of Jeremy D.L.), 177 Wis. 2d 551, 561, 503 N.W.2d 275 (Ct. App. 1993) (evidence that witness named only men other than her son's alleged father as those with whom she had intercourse was relevant to whether she had intercourse with the alleged father)

Sommers v. Friedman, 172 Wis. 2d 459, 466, 493 N.W.2d 393 (Ct. App. 1992) (in medical malpractice action, evidence that several physicians did not detect aortic dissection was relevant to defendant physician's assertion that aortic dissection is a relatively obscure illness)

State v. Davis, 171 Wis. 2d 711, 721–25, 492 N.W.2d 174 (Ct. App. 1992) (evidence of defendant's prior attempts to obtain goods and services without paying for them was relevant to intent in criminal prosecution for obtaining telephone service by fraud)

State v. Selders, 163 Wis. 2d 607, 616–20, 472 N.W.2d 526 (Ct. App. 1991) (evidence that victim appeared "composed" before pretrial lineup of suspects not material because not addressed to issue of consequence)

State v. Jensen, 147 Wis. 2d 240, 257–58, 432 N.W.2d 913 (1988) (relevant facts regarding complainant's behavior after assault may be admitted as circumstantial evidence that assault occurred)

State v. Lossman, 118 Wis. 2d 526, 546–47, 348 N.W.2d 159 (1984) (evidence of defendant's pique at prior acts of sheriff's department not relevant to offense of obstructing or resisting police officer)

Novitzke v. State, 92 Wis. 2d 302, 307–08, 284 N.W.2d 904 (1979) (evidence of defendant's hospitalization for addiction 18 months before offense of homicide by intoxicated use of motor vehicle not relevant to intoxication at time of offense)

Chapter 8
When Excludable for Prejudice

904.03 Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Judicial Council Committee's Note (1974)

This section has its genesis in Rule 303 of the Model Code. That rule was adopted for Wisconsin in *Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967), *certiorari denied* 390 U.S. 959, 88 S. Ct. 1056, 19 L.Ed.2d 1155. The application of that rule has been urged upon innumerable occasions in the short span since its approval. [For some vital considerations in its application see comment to s. 901.03(2).] Section 904.03 changes the Model Code Rule 303 by withdrawing surprise as a specific ground for its exercise. McCormick has noted that surprise is usually "coupled with the danger of prejudice and confusion of issues." The Federal Advisory Committee Note suggests that a continuance is a more appropriate remedy for surprise than exclusion. That view was endorsed in *Fredrickson v. Louisville Ladder Co.*, 52 Wis. 2d 776, 191 N.W.2d 193 (1971), and *Kirkpatrick v. State (DNR)*, 53 Wis. 2d 522, 192 N.W.2d 856 (1972), *petition for certiorari*, 40 U.S.L.W. 3569 (U.S. May 30, 1972) (No. 1520), in considering whether surprise outweighed the probative value of the evidence. Note however that testimony which results in surprise may be excluded if the surprise would require a continuance and thus undue delay.

Authors' Note. *See also* Wis. Stat. § 401.303(7) (precludes admission of relevant evidence of "usage of trade" in Uniform Commercial Code (UCC) case unless party wishing to admit evidence has given notice to other party sufficient to prevent unfair surprise).

Case Annotations

Authors' Note. Case annotations relating to Wis. Stat. ch. 904 are arranged as follows. Cases defining relevance are included under Wis. Stat. § 904.01, cases that found specific evidence to be relevant or irrelevant are included under Wis. Stat. § 904.02, and cases that discuss the balancing test are included under Wis. Stat. § 904.03.

Authors' Note. Although cases variously refer to whether there is "undue prejudice," whether the evidence is "unduly prejudicial," or whether the evidence is only "prejudicial," in discussing the Wis. Stat. § 904.03 balancing test, the precise issue is whether the evidence is "unfairly prejudicial."

State v. Mader, 2023 WI App 35, ¶¶ 47–49, 55–58, 408 Wis. 2d 632, 993 N.W.2d 761 (review denied).

Trial counsel's failure to object to evidence of the defendant's diminished interest in sexual intimacy with the victim's mother was not ineffective assistance because the testimony was relevant—one inference was that the defendant was obtaining sexual gratification elsewhere (e.g., from his stepdaughter)—and it was not unfairly prejudicial.

In the same case, the court affirmed the trial court's discretion in excluding evidence of the victim's employment (hosting parties promoting sexual aids) as irrelevant and unfairly prejudicial.

Vanderventer v. Hyundai Motor Am., 2022 WI App 56, ¶¶ 85–92, 111–118, 405 Wis. 2d 481, 983 N.W.2d 1 (review denied).

This was a products-liability case alleging enhanced injuries as a result of a defective driver's seat. The trial court properly admitted evidence of 85 product recalls involving the same manufacturer's vehicles and components, other than the driver's seat at issue. The recall evidence was relevant to rebut the presumption in Wis. Stat. § 895.047(3)(b) that compliance with governmental standards creates a rebuttable presumption that the product is not defective. The court of appeals affirmed the trial court's discretionary determination that the evidence was not unfairly prejudicial. The trial court made clear that the evidence was relevant only to rebutting the manufacturer's reliance on compliance with the federal safety standards, and the plaintiff adhered to that limitation. The trial court handled the recall evidence "succinctly" and did not allow the plaintiff to delve into the details of the individual recalls.

In the same case, the court of appeals affirmed the trial court's discretion in allowing expert testimony over the objection that two opinions were not disclosed in discovery because the defense was neither surprised nor prejudiced by the opinions.

State v. Williams, 2015 WI 75, ¶¶ 84–87, 364 Wis. 2d 126, 867 N.W.2d 736.

Crime scene photographs depicting the victim's fatal wounds were not so overly gruesome as to be unfairly prejudicial.

State v. Krancki, 2014 WI App 80, ¶ 20, 355 Wis. 2d 503, 851 N.W.2d 824.

Despite a stipulation from the defense, evidence of an illegal blood alcohol concentration (BAC) was properly admitted and not unfairly prejudicial because it went to an element necessary to prove the crime—operating a motor vehicle while intoxicated, as a seventh offense.

Estate of Kriefall v. Sizzler USA Franchise, Inc., 2011 WI App 101, ¶¶ 47–48, 335 Wis. 2d 151, 801 N.W.2d 781, *aff'd on other grounds*, 2012 WI 70, 342 Wis. 2d 29, 816 N.W.2d 853.

In a case in which a child was alleged to have died as a result of consuming E. coli-contaminated meat, the probative value of evidence of a past incident of restaurant patrons' norovirus illnesses was substantially outweighed by the danger of unfair prejudice.

State v. Munford, 2010 WI App 168, ¶¶ 26–32, 330 Wis. 2d 575, 794 N.W.2d 264.

In a criminal prosecution for first-degree intentional homicide, the minimal probative value of evidence that the investigating police department destroyed the van from which the fatal shots were fired, before the defendant's experts had an opportunity to inspect it, was substantially outweighed by the probability of confusion and misleading the issues when the jury was informed that the state had the van and that the van was destroyed.

State v. Linton, 2010 WI App 129, ¶¶ 24–28, 329 Wis. 2d 687, 791 N.W.2d 222.

In a criminal prosecution for felony murder as a party to the crime, with a penalty enhancer for committing the underlying crime while armed with a dangerous weapon, it was within the court's discretion to permit the introduction of autopsy photographs of the deceased to show the damage inflicted by bolt cutters used as the weapon. The court appropriately considered the sensitive nature of the photos and concluded this was outweighed by their probative value.

Fields v. American Transmission Co., 2010 WI App 59, ¶¶ 10–11, 324 Wis. 2d 417, 782 N.W.2d 729.

In this condemnation case, the circuit court erroneously excluded evidence of the taking utility's preexisting easement rights over the plaintiffs' property. Such evidence was highly probative of the difference in value of the property before and after the utility sought to condemn a new easement over it.

State v. Quiroz, 2009 WI App 120, ¶¶ 18–27, 320 Wis. 2d 706, 772 N.W.2d 710.

Flight evidence is generally admissible against the defendant as circumstantial evidence of consciousness of guilt. Evidence of flight may be inadmissible when there is an independent reason for flight that cannot be explained to the jury because of its prejudicial effect on the defendant. When a defendant points to an unrelated crime to explain flight, the court must, as it must with all evidence, determine whether to admit the flight evidence by weighing the risk of unfair prejudice with its probative value.

State v. Denton, 2009 WI App 78, ¶¶ 12, 19–23, 319 Wis. 2d 718, 768 N.W.2d 250.

Although "surprise" is not a basis for exclusion under Wis. Stat. § 904.03, evidence that results in surprise may be excluded if it would require a continuance and cause undue delay, or if the surprise is coupled with the danger of unfair prejudice or confusion of issues. In this prosecution, the surprise was the introduction during trial, without notice, of a computer-generated animation of the state's view of several witnesses prepared by a lay witness who had no personal knowledge of the scene depicted in the animation. Concluding that the danger of unfair prejudice substantially outweighed the probative value of the evidence, the court of appeals held that the trial court erroneously exercised its discretion in admitting the animation.

State v. Payano, 2009 WI 86, ¶¶ 3, 80–104, 320 Wis. 2d 348, 768 N.W.2d 832.

In a criminal prosecution for causing reckless injury with a dangerous weapon, potentially unfair prejudice did not substantially outweigh the probative value of an informant's testimony that, while at the defendant's apartment the day before the alleged offense, the informant observed the defendant packaging cocaine and saw a gun on a table next to the defendant. The prosecution advanced the informant's testimony to show context for the presence of the police (executing a no-knock search warrant), to establish a motive for the defendant to shoot (gaining time to dispose of drugs), and to negate the claim of self-defense. The defendant testified that, in defense of himself and his family, he fired a gun into the entry door of his apartment while people were attempting to break it down from the outside. He argued that the testimony from the informant about the drug activity of the previous day unfairly tainted his character by portraying him to be a drug dealer.

The term "substantially" in Wis. Stat. § 904.03 means that if the probative value of the evidence is close to or equal to its unfair prejudicial effect, the evidence must be admitted. The test is not whether the evidence harms the opposing party's case, but whether the evidence tends to influence the outcome by "improper means," such as appealing to the jury's sympathies, arousing a sense of horror, provoking an instinct to punish, or otherwise causing a jury to base its decision on something other than established propositions in the case.

In this case, a limiting instruction, although not required, would have been desirable. Neither party requested it.

If the proffered evidence carries the danger of unfair prejudice, the trial court can mitigate that danger by (1) a stipulation, (2) "editing" (limiting) the evidence, (3) a limiting instruction, and (4) restrictions on argument.

State v. Doss, 2008 WI 93, ¶¶ 78–79, 312 Wis. 2d 570, 754 N.W.2d 150.

In this criminal case in which the defendant was accused of unlawfully retaining funds from her father's estate, evidence that the Department of Revenue had earlier mailed a civil complaint seeking, among other remedies, the payment of past-due income taxes from the assets of the estate, for which the defendant was personal representative, was relevant to show that she knew about the lawsuit and acted consistently with that knowledge. The fact that evidence of the Department of Revenue lawsuit may have led the jury to infer that defendant possessed funds to which she was not entitled did not render the evidence unfairly prejudicial because the evidence did not tend to cause the jury to base its decision on something other than established propositions in the case.

State v. Burton, 2007 WI App 237, ¶¶ 13–17, 306 Wis. 2d 403, 743 N.W.2d 152.

A person's gang affiliation is relevant to show bias on the part of the person only when there is a "tight fit" between the gang affiliation and some specific motivation to be untruthful.

In this case, a criminal prosecution involving several alleged shootings by the defendant, an expert's general assessments, such as testimony that people "up in that area" do not cooperate with police, were unfairly prejudicial because they tarred other witnesses with undemonstrated gang affiliations based on where they lived.

Note. Compare decision with *State v. Long*, 2002 WI App 114, 255 Wis. 2d 729, 647 N.W.2d 884.

Roy v. St. Lukes Med. Ctr., 2007 WI App 218, ¶¶ 12–14, 305 Wis. 2d 658, 741 N.W.2d 256.

A video animation objected to on the basis of surprise was admissible in a medical malpractice action to show a defense expert's theory of the incident and his understanding of the plaintiff's theory. Although surprise is not listed as a specific ground for excluding testimony under Wis. Stat. § 904.03, evidence that results in surprise may be excluded if the surprise would require a continuance causing undue delay or if surprise is coupled with the danger of prejudice and confusion of issues.

State v. Rodriguez, 2006 WI App 163, ¶ 31, 295 Wis. 2d 801, 722 N.W.2d 136, *aff'd on other grounds on remand*, 2007 WI App 252, 306 Wis. 2d 129, 743 N.W.2d 460.

In a prosecution for battery and intimidation of a victim and of a witness, the probative value of evidence of a victim's possible motive to recant her out-of-court excited utterance assertions was not outweighed by the danger of unfair prejudice to the defendant.

State v. Schutte, 2006 WI App 135, ¶¶ 51–56, 295 Wis. 2d 256, 720 N.W.2d 469.

In a prosecution for criminal negligent operation of a vehicle, evidence that the driver smoked marijuana shortly before the accident or while driving was relevant and the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice, even though the expert toxicologist was unable to render an opinion as to whether marijuana had any ability to affect the defendant's ability to drive safely because of the temporal proximity of her marijuana use to the collision.

State v. Hibl, 2006 WI 52, ¶¶ 51–54, 290 Wis. 2d 595, 714 N.W.2d 194.

A trial court has a limited gatekeeping function, even with constitutionally admissible eyewitness identification evidence, to engage in an analysis under Wis. Stat. § 904.03 as to whether that evidence bears the requisite degree of reliability to be presented to the jury. That analysis should take into consideration the evolving body of law on eyewitness identification and the scientific research that forms some of its underpinnings. Unfair prejudice is the consequence of extreme unreliability.

State v. Walters, 2004 WI 18, ¶¶ 29–43, 269 Wis. 2d 142, 675 N.W.2d 778.

"*Richard A.P.* evidence" in a sexual molestation case is relevant and admissible under Wis. Stat. § 904.04(1)(a), which allows a defendant to introduce pertinent traits of the defendant's character as evidence. But because the admissibility of *Richard A.P.* evidence is subject to the discretionary determination of a trial court, the trial court did not erroneously exercise its discretion by excluding the proffered evidence when it determined that the evidence had minimal probative value and could confuse and mislead the jury.

State v. Pfaff, 2004 WI App 31, ¶ 30, 269 Wis. 2d 786, 676 N.W.2d 562.

When the defense attorney plants the seed for the idea of an offer by the defendant to take a polygraph test, the probative value of the offer as "consciousness of innocence" is diminished to a level at which it no longer assists on the question of guilt or innocence and takes the jury into the realm of speculation and confusion.

Poluk v. J.N. Manson Agency, Inc., 2002 WI App 286, ¶¶ 28–31, 258 Wis. 2d 725, 653 N.W.2d 905.

In a coverage dispute between an estate and the insurer of a building destroyed by fire, the trial court's admission of a portion of the will showing that the building's sale proceeds would go to local charities was an erroneous exercise of discretion because the trial court failed to balance the will's probative value and its prejudicial effect.

Hicks v. Nunnery, 2002 WI App 87, ¶¶ 71–73, 253 Wis. 2d 721, 643 N.W.2d 809.

An attorney's "mea culpa" affidavit from a former client's postconviction ineffective-assistance-of-counsel proceedings is admissible in a malpractice action against the attorney.

State v. Wolfe (In re Commitment of Wolfe), 2001 WI App 136, ¶¶ 40–42, 246 Wis. 2d 233, 631 N.W.2d 240.

In a proceeding under Wis. Stat. ch. 980, evidence of the defendant's arson adjudication and misconduct while at a treatment center was probative of the defendant's mental disorder, dangerousness, and risk of reoffending and was not unfairly prejudicial in light of the defendant's lengthy sexual offense history.

State v. Santana-Lopez, 2000 WI App 122, ¶¶ 4–7, 237 Wis. 2d 332, 613 N.W.2d 918.

A defendant's offer to undergo DNA testing may be relevant as reflecting consciousness of innocence if the person making the offer believes the test is possible, accurate, and admissible. The trial court erred in rejecting evidence of the offer without first finding conditional relevance under Wis. Stat. § 901.04(1) and then, if the court determined the defendant believed DNA could detect the sexual assaults that he was charged

with committing, exercising discretion under Wis. Stat. § 904.03 to decide whether the relevance of that evidence is substantially outweighed by the factors set forth in that rule.

State v. Scott, 2000 WI App 51, ¶¶ 17–26, 234 Wis. 2d 129, 608 N.W.2d 753.

A defense witness in a criminal proceeding was properly impeached with evidence of his prior convictions, sentences, and parole eligibility when the witness was not eligible for parole for another 60 years, admitted committing the crime, and absolved the defendant from responsibility. The evidence was relevant to the witness's motive to lie and, while prejudicial, it was not unfairly so because without it the jury would have been deprived of an explanation for the witness's possible motive for confessing to the crime.

State v. Miller, 231 Wis. 2d 447, 460–62, 605 N.W.2d 567 (Ct. App. 1999).

Evidence of an accused individual's flight from police three days after the original criminal episode to prove consciousness of guilt was not unfairly prejudicial merely because the court severed criminal charges stemming from the original episode from the charges of fleeing and eluding. Severance and the admissibility of evidence are independent issues.

Ellsworth v. Schelbrock, 229 Wis. 2d 542, 563–65, 600 N.W.2d 247 (Ct. App. 1999), *aff'd on other grounds*, 2000 WI 63, 235 Wis. 2d 678, 611 N.W.2d 764.

Pretrial experiments may be admitted into evidence if their probative value is not substantially outweighed by prejudice, confusion, and waste of time. In this products-liability action, when it was alleged that an automobile manufacturer negligently designed its vehicle by placing the gas tank under the vehicle's trunk, it was appropriate to allow the manufacturer to introduce a videotape of a crash test that demonstrated the susceptibility to explosion even if the gas tank had been placed where the plaintiff's expert contended it should have been, despite many dissimilarities between the pretrial experiment and the incident. As long as enough important factors in the case are duplicated in the experiment and the failure to control other possibly relevant variables is explained, then admission of evidence is appropriate if the jury is aided by the admission.

State v. Huntington, 216 Wis. 2d 671, 696, 575 N.W.2d 268 (1998).

Needless presentation of cumulative evidence is one factor for the court to consider in determining whether evidence is more prejudicial than probative. When an 11-year-old alleged sexual-assault victim's mother, sister, police officer, social worker, and nurse practitioner testified that the alleged victim had told them that the defendant had sexually assaulted her, that evidence was not cumulative. The defendant's trial strategy, which focused on attacking perceived inconsistencies in the victim's statements to those witnesses, made their testimony material to the case and not unfairly prejudicial to the defendant.

State v. Jackson, 216 Wis. 2d 646, 665–68, 575 N.W.2d 475 (1998).

Excerpts from the defendant's letters containing threats against his girlfriend, the complainant in a sexual-assault-related prosecution, were not admissible by the state during the cross-examination of the girlfriend's sister, who was called as the defendant's witness and had characterized the defendant's statements as nonthreatening, because the court had not adequately weighed the unfair prejudice of the threats as character evidence against their probative value in attacking the sister's credibility. However, the error in admitting this evidence was harmless, in light of other substantial evidence supporting the defendant's conviction.

State v. Sullivan, 216 Wis. 2d 768, 789–92, 576 N.W.2d 30 (1998).

In a prosecution for a defendant's alleged battery of his girlfriend, the probative value of evidence of a prior incident of a domestic disturbance between the defendant and his former wife, which involved no physical contact and was not relevant to the issue of intent or absence of accident in the later incident, was substantially outweighed by the danger of unfair prejudice. The jurors would have been so influenced by the other acts evidence that they would have likely convicted the defendant on the basis that the evidence showed him to be a bad man.

Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise causes a jury to base its decision on something other than the established propositions in the case.

State v. Alexander, 214 Wis. 2d 628, 643–45, 651, 571 N.W.2d 662 (1997).

In a prosecution for operating a motor vehicle with a prohibited alcohol concentration, it was an erroneous exercise of discretion for the trial court to permit the state to introduce evidence of prior convictions, as counted under Wis. Stat. § 343.307(1), solely to prove the convictions as a status element of the charged crime, when the defendant had fully admitted that element. While obviously relevant, such evidence is unfairly prejudicial, because the prior offense evidence is similar to or of the same nature or character as the subsequently charged crime but depends on some judgment rendered wholly independently of the later crime. In this circumstance, the potential prejudice "may not be adequately cured by a limiting instruction."

If the evidence were admissible for some reason other than proving the defendant's status as a prior offender, such as motive or intent, Wis. Stat. § 904.04(2), regarding other crimes evidence, guarantees the state the opportunity to seek its admission.

Magyar v. Wisconsin Health Care Liab. Ins. Plan, 211 Wis. 2d 296, 303–04, 564 N.W.2d 766 (1997).

Although "surprise" is not listed as a specific ground for excluding evidence, it may justify exclusion if the surprise would require a continuance causing undue delay or if the surprise is coupled with the danger of prejudice and confusion of the issues. Relevant evidence is excluded only if the probative value of the evidence is outweighed by unfair surprise.

State v. Richardson, 210 Wis. 2d 694, 708–09, 563 N.W.2d 899 (1997).

When the relative probative value of evidence is low, the level of the dangers and considerations necessary to outweigh the probative value is correspondingly lower. The defendant in this case was charged with the sexual assault of a child and false imprisonment. He contended that he had been "framed" by his estranged wife. In support of this defense, the defendant offered evidence that his wife had telephoned his divorce lawyer two days before the incident that led to these charges, and she had claimed that the defendant was having sex with a 14-year-old. While this evidence had relevance, its relative probative value was slight. The frame-up evidence here would have led to a substantial waste of time on collateral issues and thus was properly excluded.

State v. Kourtidias, 206 Wis. 2d 574, 581–83, 557 N.W.2d 858 (Ct. App. 1996).

In a child enticement case, evidence that the defendant had prior acts with young girls was held relevant. The probative value of such other acts evidence was not outweighed by the danger of unfair prejudice.

State v. Ingram, 204 Wis. 2d 177, 182–85, 554 N.W.2d 833 (Ct. App. 1996).

In a prosecution for fleeing a traffic officer, the court permitted evidence that the defendant was a high-risk parolee, had recently been released from prison, and had not kept in touch with his parole agent. The court of appeals found this evidence relevant to the defendant's motive and intent to flee from the police. Furthermore, while this evidence was prejudicial, it was not unfairly prejudicial under Wis. Stat. § 904.03, given its probative value in explaining why the defendant fled.

Calaway v. Brown Cnty., 202 Wis. 2d 736, 741–44, 553 N.W.2d 809 (Ct. App. 1996).

Evidence of comparable real estate sales is generally relevant in condemnation proceedings so long as the sales are not too remote in time and are sufficiently alike as to character, situation, usability, and improvements to make a true comparison. In this case, the trial court properly excluded, as too remote in time and unfairly prejudicial, evidence of a "comparable" sale that was made four and one-third years after the taking.

State v. McCall, 202 Wis. 2d 29, 36–42, 549 N.W.2d 418 (1996).

If bias evidence, taken as a whole, might direct the jury's attention away from the case under consideration, it may be prejudicial and properly excluded by the trial court. Thus, in this case, the trial court did not erroneously exercise its discretion by barring a defendant from cross-examining the state's main witness regarding an alleged agreement with the prosecutor concerning the recent dismissal of criminal charges against the witness. The slight probative value failed to overcome a strong likelihood of confusing the issues and causing unfair prejudice.

Johnson v. Kokemoor, 199 Wis. 2d 615, 635–36, 545 N.W.2d 495 (1996).

It is not sufficient that evidence be prejudicial in order for relevant evidence to be excluded; exclusion is required only if the evidence is unfairly prejudicial. In an "informed consent" medical malpractice suit, the trial court did not erroneously exercise its discretion in allowing evidence of the defendant physician's failure to adequately inform the plaintiff patient as to the extent of his experience in performing the operation in question, the risks associated with the operation, and the lesser likelihood of risk if the physician had referred the patient to a better-equipped facility.

Huss v. Yale Materials Handling Corp., 196 Wis. 2d 515, 526–29, 538 N.W.2d 630 (Ct. App. 1995).

When both negligence and strict liability are alleged in a products-liability suit, the trial court exercises its discretion in determining whether to allow evidence of a subsequent remedial measure. A trial court may properly determine that such evidence be excluded if it will cause unfair prejudice to the manufacturer and cause confusion with the jury. If the evidence of subsequent remedial measures is allowed, the manufacturer is entitled to a limiting instruction directing the jury to consider the evidence only as to the strict liability claim.

Whether postmanufacture industry custom is admissible to prove negligence in a products-liability suit is not governed by Wis. Stat. § 904.07 or any other specific evidentiary rule. It is within the trial court's discretion to exclude relevant evidence of postmanufacture custom if the court concludes that the evidence would be unfairly prejudicial to the manufacturer and would confuse the jury.

State v. Brewer, 195 Wis. 2d 295, 310, 536 N.W.2d 406 (Ct. App. 1995).

Wis. Stat. § 904.03 favors admissibility. If the probative value of the evidence is close or equal in value to its prejudicial effect, the evidence must be admitted.

State v. Murphy, 188 Wis. 2d 508, 523, 524 N.W.2d 924 (Ct. App. 1994).

Evidence that was admissible for a proper purpose under Wis. Stat. § 904.04(2) was not unfairly prejudicial when the trial court minimized the risk of prejudice by streamlining the presentation of the evidence to avoid a protracted presentation and by issuing a cautionary instruction to the jury both before the other acts evidence was presented and as part of the final instructions to the jury.

State v. Johnson, 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994).

The standard for unfair prejudice is not whether the evidence harms the opposing party's case but whether the evidence tends to influence the outcome of the case by "improper means." In most instances, as the probative value of relevant evidence increases, so will the fairness of its prejudicial effect.

> ***Authors' Note.*** The *Johnson* court urged appellate courts to openly acknowledge the fact that the admonition in *Whitty v. Steele*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967), that other acts evidence should be used sparingly is not the bastion against the use of other acts evidence that it once was.

Johnson v. Agoncillo, 183 Wis. 2d 143, 154, 515 N.W.2d 508 (Ct. App. 1994).

The standard of care in a medical negligence case is the degree of care that an average physician in a specialty might use in treating a patient. Therefore, a court may prohibit a physician from testifying regarding what the physician might have done in a particular situation on the ground that the physician's qualifications show the physician to be an above-average practitioner. In such a situation, the physician's high level of expertise could overwhelm the jury's assessment of what a general practitioner should have done. As such, the evidence is inadmissible because it may confuse the issues or mislead the jury.

State v. Beaver, 181 Wis. 2d 959, 971, 512 N.W.2d 254 (Ct. App. 1994).

The relevance of preliminary breath test results to the alleged inaccuracy of a defendant's statement was outweighed by the other considerations of Wis. Stat. § 904.03. Standing alone, such evidence contributed to the issue whether the defendant's statement given at that alcohol concentration level was trustworthy.

State v. Fleming, 181 Wis. 2d 546, 563, 510 N.W.2d 837 (Ct. App. 1993).

The court held that photographs of the victim taken the morning after the alleged battery were admissible even though they showed the victim in a worse condition than did photographs of the victim taken on the night of the incident. The court held that the photographs were relevant and did not prejudice the defendant because the theory of defense was that another person had inflicted additional injuries during the time between the taking of the two sets of pictures.

State v. Patricia A.M., 176 Wis. 2d 542, 554, 500 N.W.2d 289 (1993).

Evidence is unfairly prejudicial when it threatens the fundamental goals of accuracy and fairness of the trial by misleading the jury or by influencing the jury to decide the case on an improper basis. Unfair prejudice is an undue tendency to suggest decision on an improper basis, commonly, although not necessarily, an emotional one. Unfairness attaches if the evidence tends to influence the outcome by improper means, appeals to the jury's sympathies, arouses a sense of horror, promotes the desire to punish, or otherwise causes the jury to base its decision on extraneous considerations.

Sommers v. Friedman, 172 Wis. 2d 459, 466, 471, 493 N.W.2d 393 (Ct. App. 1992).

The trial court properly exercised its discretion by admitting the testimony of physicians who examined the patient and reached the same conclusions as did the defendant physician, when the admission of the evidence was accompanied by a cautionary instruction.

The trial court also appropriately exercised its discretion when it refused to allow questioning of the defendant physician regarding her failure to pass her board examinations, because she gave little in the way of opinion evidence and there was substantial danger that the information might cause the jury to infer her care of the plaintiff was substandard.

State v. Grande, 169 Wis. 2d 422, 434–35, 485 N.W.2d 282 (Ct. App. 1992).

All evidence of an element of an offense is "prejudicial" to the defendant, but the defendant has no right to claim that such evidence is unfair and excludable under this section when it is admissible and is the only evidence of an element of the charged offense. To withhold the evidence would preclude a conviction. Thus, evidence of a sexual assault, while incriminating to the defendant, was admissible in a prosecution for kidnapping when it was the only evidence of one element of the kidnapping charge. As a matter of law, the evidence was neither unfair to the defendant nor misleading to the jury.

State v. Mordica, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992).

In a drug possession prosecution, the defendant's proffered testimony that his prior admission to ownership of seized drugs was a lie to protect a friend was admissible. The testimony was found to be more probative than prejudicial.

The test under this section is whether evidence is *unfairly* prejudicial. Unfair prejudice results when testimony would have a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, or provokes its instinct to punish.

City of Mequon v. Hess, 158 Wis. 2d 500, 506–07, 463 N.W.2d 687 (Ct. App. 1990).

Variations in breathalyzer test results are not so prejudicial that a jury would be unable to assess the probative value of the test results. The issue of reliability or accuracy of test results is one of weight, not admissibility, and is for the jury to decide.

State v. Amos, 153 Wis. 2d 257, 450 N.W.2d 503 (Ct. App. 1989).

Generally, a witness may not be impeached with collateral facts introduced by extrinsic evidence. There is no proscription against using extrinsic evidence to show corrupt testimonial intent (e.g., evidence of subornation of perjury tending to show a consciousness of guilt).

Farrell v. John Deere Co., 151 Wis. 2d 45, 76–78, 443 N.W.2d 50 (Ct. App. 1989).

Evidence of other accidents may be admissible in a products-liability case to show the probability of the defect, cause, or knowledge. It may only be admitted when the prior accidents occurred under conditions and circumstances similar to those of the accident in question. The court must balance the relevance of the evidence against the risk of unfair prejudice.

Authors' Note. *See also Netzel v. State Sand & Gravel Co.*, 51 Wis. 2d 1, 186 N.W.2d 258 (1971).

State v. Pulizzano, 148 Wis. 2d 190, 202, 434 N.W.2d 807 (Ct. App. 1988), *aff'd*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990).

It was not error to prohibit testimony of prior untruthful allegations of sexual assault made by the complainant when the testimony was a "tangled web of multiple hearsay," because admitting it would have resulted in a mini-trial on an extrinsic issue.

Gieseke v. DOT, 145 Wis. 2d 206, 212–13, 426 N.W.2d 79 (Ct. App. 1988).

A videotape objected to on the basis of surprise was admissible in a condemnation action to show that after the taking, the farm was not as safe and therefore was less valuable. Although surprise is not listed as a specific ground for excluding testimony under this section, evidence that results in surprise may be excluded if the surprise would require a continuance causing undue delay or if the surprise is coupled with the danger of prejudice and confusion of issues.

Wheeler v. General Tire & Rubber Co., 142 Wis. 2d 798, 815, 419 N.W.2d 331 (Ct. App. 1987).

If the probative value of the evidence for impeachment purposes substantially outweighs the danger of unfair prejudice, it may be admissible.

State v. Gulrud, 140 Wis. 2d 721, 734–36, 412 N.W.2d 139 (Ct. App. 1987).

Evidence of the deposit of semen in the complaining witness by a man other than the defendant between the time of the alleged assaults by the defendant and a hospital examination was properly excluded because its probative value was substantially outweighed by the danger of unfair prejudice.

Gonzalez v. City of Franklin, 128 Wis. 2d 485, 498–500, 383 N.W.2d 907 (Ct. App. 1986), *aff'd*, 137 Wis. 2d 109, 403 N.W.2d 747 (1987).

Evidence is unfairly prejudicial if it tends to influence the outcome by improper means or if it provokes one's instincts to punish. It was therefore proper to exclude evidence relating to the plaintiff's status as an undocumented immigrant. Likewise, it was proper for the trial court to preclude counsel from informing the jury that the plaintiffs had not filed income tax returns, because such information might have unfairly prejudiced the jury.

Maskrey v. Volkswagenwerk Aktiengesellschaft, 125 Wis. 2d 145, 165, 370 N.W.2d 815 (Ct. App. 1985).

Motion pictures of pretrial experiments are admissible if their probative value is not outweighed by prejudice, confusion, and waste of time and the jury is made aware that they are offered as illustrations of principles involved. However, if distortion occurs, if enough of the obviously important factors are not duplicated, or if the failure to control other possibly relevant variables is not explained, they should be excluded.

State v. Flattum, 122 Wis. 2d 282, 306, 361 N.W.2d 705 (1985).

The area of psychiatric testimony is one with considerable question regarding reliability. As such, trial courts are free to exclude it if it is not relevant; if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading a jury; or if it is not based on scientific knowledge.

The mental health history of a defendant is admissible, if relevant, to prove or disprove the defendant's capacity to form intent, subject to weighing of probative value.

State v. O'Connor, 77 Wis. 2d 261, 287–88, 252 N.W.2d 671 (1977).

Although surprise is not listed as a specific ground for the exclusion of evidence under this section, and a continuance will generally be a more appropriate remedy for a surprise than exclusion, nonetheless, if a surprise would require an unduly long continuance, exclusion of testimony may be justified.

See also ....

State v. Lindvig, 205 Wis. 2d 100, 107–08, 555 N.W.2d 197 (Ct. App. 1996) (photographs of arrow through victim's leg were relevant to prove bodily harm and did not so inflame and prejudice jury as to require exclusion, even when defendant was willing to stipulate to bodily-harm element of offense)

Ollhoff v. Peck, 177 Wis. 2d 719, 725–26, 503 N.W.2d 323 (Ct. App. 1993) (relevant evidence of subsequent remedial measure in safe-place action may be excluded under Wis. Stat. § 904.03)

State v. Hubanks, 173 Wis. 2d 1, 21, 496 N.W.2d 96 (Ct. App. 1992) (evidence of defendant's unwillingness to speak for voice identification not unfairly prejudicial)

Peeples v. Sargent, 77 Wis. 2d 612, 634, 253 N.W.2d 459 (1977) (trial court acted within its discretion in refusing to allow question using phrase "guilty of malpractice")

Featherly v. Continental Ins. Co., 73 Wis. 2d 273, 283, 243 N.W.2d 806 (1976) (exclusion of daytime photographs in case involving a nighttime accident within discretion of trial court)

Chapter 9
Character and Habit

904.04 Character evidence not admissible to prove conduct; exceptions; other crimes.

(1) CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(a) *Character of accused.* Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same;

(b) *Character of victim.* Except as provided in s. 972.11(2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(c) *Character of witness*. Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09

(2) OTHER CRIMES, WRONGS, OR ACTS. (a) *General admissibility.* Except as provided in par. (b)2., evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(b) *Greater latitude.* 1. In a criminal proceeding alleging a violation of s. 940.302(2) or of ch. 948, alleging the commission of a serious sex offense, as defined in s. 939.615(1)(b), or of domestic abuse, as defined in s. 968.075(1)(a), or alleging an offense that, following a conviction, is subject to the surcharge in s. 973.055, evidence of any similar acts by the accused is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act.

2. In a criminal proceeding alleging a violation of s. 940.225(1) or 948.02(1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225(1) or 948.02(1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order to show that the person acted in conformity therewith.

Judicial Council Committee's Note (1974)

Sub. (1). The general ban on character evidence to prove that a person acted in conformity therewith on a particular occasion is consistent with Wisconsin cases, *Eisenberg v. Continental Casualty Co.*, 48 Wis. 2d 637, 180 N.W.2d 726 (1970); *Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967), *certiorari denied* 390 U.S. 959, 88 S.Ct. 1056, 19 L.Ed.2d 1155; *State v. Adams*, 257 Wis. 433, 43 N.W.2d 446 (1950); *Rice v. State*, 195 Wis. 181, 217 N.W. 697 (1928); *Schultz v. State*, 133 Wis. 215, 113 N.W. 428 (1907); *Lowe v. Ring*, 123 Wis. 107, 101 N.W. 381 (1904); *Meehan v. State*, 119 Wis. 621, 97 N.W. 173 (1903). *Cf. Buel v. State*, 104 Wis. 132, 80 N.W. 78 (1899). Wisconsin cases support the first exception; *Whitty v. State*, *supra*, *Schultz v. State*, *supra*; the second exception, *Watry v. Ferber*, 18 Wis. 500, 86 Arn. Dec. 789 (1864) [a Wisconsin civil case for seduction provides support for the criminal case rule], *Lowe v. Ring*, *supra*; *State v. Nergaard*, 124 Wis. 414, 102 N.W.

899 (1905), *Schroeder v. State*, 222 Wis. 251, 267 N.W. 899 (1936), and the third exception, *Lowe v. Ring, supra*; *Watry v. Ferber*, *supra*; *Ketchingman v. State*, 6 Wis. 426 (1857). Exception (b) makes clear that evidence in a homicide case claiming the victim was the first aggressor affords the prosecution the right to introduce rebutting evidence of the peacefulness of the victim.

Sub. (2). The Wisconsin cases are in accord, *Parham v. State*, 53 Wis. 2d 458, 192 N.W.2d 838 (1972); *State v. Hutnik*, 39 Wis. 2d 754, 159 N.W.2d 733 (1968); *State v. Midell*, 39 Wis. 2d 733, 159 N.W.2d 614 (1968); *State v. Watkins*, 39 Wis. 2d 718, 159 N.W.2d 675 (1968), *certiorari denied* 393 U.S. 1036, 89 S.Ct. 655, 21 L.Ed.2d 581, *rehearing denied* 393 U.S. 1113, 89 S. Ct. 889, 21 L. Ed.2d 815; *Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967), *certiorari denied* 390 U.S. 959, 88 S. Ct. 1056, 19 L.Ed.2d 1155 (1968); *State v. Reynolds*, 28 Wis. 2d 350, 137 N.W.2d 14 (1965); *Slack v. Joyce*, 163 Wis. 567, 158 N.W. 310 (1916); *Brennan v. Town of Friendship*, 67 Wis. 223, 29 N.W. 902 (1886). Evidence of other crimes, wrongs or acts which tend to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, is not automatically admissible. It should be excluded if the motive, opportunity, intent, etc., is not substantially disputed or if under all the circumstances the danger of undue prejudice substantially outweighs the probative value under s. 904.03.

Case Annotations

(1) Character Evidence Generally

State v. Stroik, 2022 WI App 11, ¶¶ 41–42, 401 Wis. 2d 150, 972 N.W.2d 640.

In a trial for first-degree sexual assault of a child, testimony of the defendant's former girlfriend that he had a high sex drive was general character evidence that was inadmissible because it was offered to show propensity—that the defendant had a character trait that would make it more likely that he would sexually assault a child. The greater-latitude rule and the exception for proving intent under the other acts rule do not apply to general character evidence.

Balz v. Heritage Mut. Ins. Co., 2006 WI App 131, ¶¶ 13–18, 294 Wis. 2d 700, 720 N.W.2d 704.

Admissible habit evidence is distinguishable from inadmissible character evidence in that habit is a regular repeated response to a repeated, specific situation, whereas character is a generalized description of a person's nature. Evidence that a party engaged in the practice of creating records to falsely reflect that he was conducting business of his employer was not evidence of habit when it did not form any predictable pattern and would not show that the party was actually engaging in personal business on the day in question. Rather, such evidence simply addresses the party's propensity for dishonesty.

State v. Quinsanna D. (In re Termination of Parental Rts. to Teyon D.), 2002 WI App 318, ¶¶ 21–24, 259 Wis. 2d 429, 655 N.W.2d 752.

In a termination of parental rights proceeding, evidence of a parent's character was admissible to prove that she had failed to assume parental responsibility for her children.

State v. Pulizzano, 155 Wis. 2d 633, 658, 456 N.W.2d 325 (1990).

Evidence of "battering parent syndrome," which suggests that adults who are battered or abused as children have a propensity to batter or abuse others as adults, is generally inadmissible in a case-in-chief under Wis. Stat. § 904.04.

State v. Pence, 150 Wis. 2d 759, 767–69, 442 N.W.2d 540 (Ct. App. 1989).

When entrapment is an issue, evidence of subsequent refusals to commit a crime may be relevant on the issue of predisposition. Predisposition may raise an issue of character governed by Wis. Stat. § 904.04(1) or may be considered as a state of mind at a particular time under Wis. Stat. § 904.04(2).

State v. Bedker, 149 Wis. 2d 257, 268–69, 440 N.W.2d 802 (Ct. App. 1989).

Evidence that a person is law abiding is not admissible under Wis. Stat. § 904.04. It does not follow from the fact that a person has never been convicted of a crime that a person is law abiding. Lawless persons may avoid convictions.

State v. Brecht, 143 Wis. 2d 297, 322–23, 421 N.W.2d 96 (1988).

A probation officer's testimony about a defendant's character for nonviolence did not open the door to cross-examination of the officer regarding the defendant's worthless check convictions. The introduction of character evidence is limited to that which rebuts the character trait being established, i.e., nonviolence.

See also ....

Milenkovic v. State, 86 Wis. 2d 272, 278, 272 N.W.2d 320 (Ct. App. 1978) (evidence of character of victim or accused, if consequential or used for impeachment, may be received)

(a) Character of Accused

State v. Davis, 2002 WI 75, ¶¶ 2, 16, 254 Wis. 2d 1, 645 N.W.2d 913.

Although *Richard A.P.* evidence (a showing through an expert that the defendant did not exhibit character traits consistent with a sexual disorder) is admissible as character evidence, the trial court must closely scrutinize such evidence for relevance and probative value, as well as for its potential for danger of unfair prejudice or confusion to the jury.

State v. Richard A.P., 223 Wis. 2d 777, 792–95, 589 N.W.2d 674 (Ct. App. 1998).

In a prosecution for sexual contact with a person under 13 years old, a defendant had a right to introduce evidence of the defendant's character to demonstrate a lack of sexual deviancy.

State v. Mainiero, 189 Wis. 2d 80, 98, 525 N.W.2d 304 (Ct. App. 1994).

In a prosecution for sexual contact with a person under age 16, in which the defendant introduced evidence of his good character for "sexual morality, decency and respect for women," the state could rebut such evidence with testimony to the contrary.

See also ....

State v. Brecht, 143 Wis. 2d 297, 322, 421 N.W.2d 96 (1988) (nonviolent character of accused admissible in first-degree murder case)

State v. Wyss, 124 Wis. 2d 681, 712, 370 N.W.2d 745 (1985) (evidence of jealousy admissible to show motive and intent in murder trial), *overruled on other grounds by State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990).

(b) Character of Victim

State v. Sarfraz, 2014 WI 78, ¶¶ 2, 52–56, 356 Wis. 2d 460, 851 N.W.2d 235.

For evidence to be admissible under the rape shield law (Wis. Stat. § 972.11(2)(b)) as past sexual conduct between the defendant and the victim, the court must determine that (1) the proffered evidence relates to sexual activity between the victim and the defendant, (2) the evidence is material to a fact at issue, and (3) the probative value of the evidence outweighs its inflammatory and prejudicial nature.

The defendant was charged with sexual assault after the alleged victim claimed that the defendant, while masked, pushed his way into her apartment and forced her to have sexual intercourse. The defendant claimed consent. Evidence of prior masturbation between the parties, while material, was inadmissible because its low probative value was outweighed by its prejudicial nature.

State v. Hanson, 2012 WI 4, ¶¶ 33–42, 338 Wis. 2d 243, 808 N.W.2d 390, *aff'g* 2010 WI App 146, ¶¶ 18–20, 330 Wis. 2d 140, 792 N.W.2d 203.

The defendant, who was charged with fleeing and eluding a police officer, sought to introduce character evidence as to the pursuing police officer's reputation for "confrontational, aggressive, and hot-tempered" behavior. The circuit court properly rejected the proffered evidence because the police officer did not meet the definition of a *victim* as contemplated by Wis. Stat. § 904.04(1)(b).

State v. Evans, 187 Wis. 2d 66, 81, 522 N.W.2d 554 (Ct. App. 1994).

In a criminal prosecution for the sexual assault of a child, the court properly precluded the defendant from attacking the child's credibility with testimony concerning specific instances of false statements made before the incident in question. The child did not testify at trial. The child's alleged character for untruthfulness was merely circumstantial evidence and did not constitute an essential element of the defendant's defense. Admissibility of the evidence was determined by the court as if the child-declarant were a witness.

State v. Boykins, 119 Wis. 2d 272, 277, 350 N.W.2d 710 (Ct. App. 1984).

When there is a sufficient factual basis to support the defense of self-defense and the violent character of the victim is an essential element of the defense, proof of the victim's reputation for being violent is relevant and admissible.

Exclusion of evidence of specific acts within one year on grounds of remoteness was an erroneous exercise of discretion.

(c) Character of Witness

State v. Eugenio, 219 Wis. 2d 391, 398–405, 579 N.W.2d 642 (1998).

Assertions about a witness's character made during opening statements constitute an attack on the character for truthfulness of the witness under Wis. Stat. § 906.08(1) when, viewing the attack on the witness in its context, the trial court believes that a reasonable person would consider the attack to be an assertion that the witness is not only lying in this instance but is a liar generally.

This holding rejects the broad "tantamount to an accusation that a witness is lying" test established in *State v. Anderson*, 163 Wis. 2d 342, 471 N.W.2d 279 (Ct. App. 1991), and *State v. Hernandez*, 192 Wis. 2d 251, 531 N.W.2d 348 (1995).

(2) Other Crimes, Wrongs, or Acts

Authors' Note. Wis. Stat. § 904.04(2) contains three rules. The general rule is set forth in subsection (a). Subsection (b) has two subparts; each applies to specific types of cases.

Wis. Stat. § 904.04(2)(a) establishes the general rule that evidence of other crimes or acts of the defendant cannot be admitted to show propensity to commit a crime, but such evidence may be admitted for an acceptable purpose. Application of this rule is governed by the three-part *Sullivan* analysis. In addition to being offered for an acceptable purpose, the evidence must be relevant and its probative value not substantially outweighed by danger of unfair prejudice. *See State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). Wis. JI—Criminal 275 (2018), which must be given upon request, cautions the jury about the appropriate use of such evidence. The instruction contains an exceptionally thorough and useful comment, setting forth the history of the rule and organizing Wisconsin cases according to the purpose for which the evidence is offered.

Wis. Stat. § 904.04(2)(b) contains two subparts. The first, Wis. Stat. § 904.04(2)(b)1., created by 2013 Wis. Act 362, qualifies the general rule in Wis. Stat. § 904.04(2)(a) for specified offenses, including domestic abuse. It permits evidence of similar acts, with greater latitude under the *Sullivan* analysis. *State v. Dorsey*, 2018 WI 10, 379 Wis. 2d 386, 906 N.W.2d 158. The similar acts must still be offered for an acceptable purpose under Wis. Stat. § 904.04(2)(a). Wis. JI—Criminal 275 cmt. (2018).

The language now found in Wis. Stat. § 904.04(2)(b)2. was created by 2005 Wis. Act 310. It applies to prosecutions for first-degree sexual assault and first-degree sexual assault of a child. It allows evidence of prior convictions of those crimes to be admitted as evidence of the defendant's character to show the defendant acted in conformity with that character with respect to the offense charged. It requires that the prior conviction be similar to the alleged violation in the current trial. *See* Wis. JI—Criminal 276 (2016).

The admissibility of other acts evidence should be handled by pretrial motion.

State v. Ochoa, 2022 WI App 35, ¶¶ 21–30, 404 Wis. 2d 261, 978 N.W.2d 501 (review denied), *cert. denied*, 143 S. Ct. 1068 (2023).

In a homicide case in which the defendant claimed self-defense, the trial court properly excluded "*McMorris* evidence" of the victims' prior specific acts of violence. *See McMorris v. State*, 58 Wis. 2d 144, 205 N.W.2d 559 (1973). To be admissible, *McMorris* evidence must be relevant and not unduly prejudicial. The trial court properly found that some proffered acts were not relevant and were too remote and dissimilar from the incident in this case. Other proffered acts had no basis on which a reasonable jury could find the acts occurred.

State v. Stroik, 2022 WI App 11, ¶¶ 43–47, 401 Wis. 2d 150, 972 N.W.2d 640.

In a trial for first-degree sexual assault of a child, testimony of the defendant's former girlfriend that he had a high sex drive was better described as general character evidence, not other acts evidence. But even if it could be considered other acts evidence, it would still be inadmissible because it failed the *Sullivan* test: while the state argued it was admissible to show intent, sexual interest in his age-appropriate girlfriend was not relevant to whether the defendant would be sexually gratified by a prohibited touching of a five-year-old child. Nor would it have been admissible under the greater-latitude rule, Wis. Stat. § 904.04(2)(b)1., concerning "evidence of any similar act[] by the accused."

State v. Johnson, 2021 WI 61, ¶¶ 32–36, 397 Wis. 2d 633, 961 N.W.2d 18.

The supreme court upheld the trial court's decision to exclude evidence of a homicide victim's possession of child pornography, finding that the evidence might cause the jury to focus on the victim's potential criminal behavior, rather than the circumstances surrounding his death, and might cause a distracting trial-within-a-trial over whether certain pictures constituted child pornography.

State v. Gutierrez, 2020 WI 52, ¶¶ 28–37, 391 Wis.2d 799, 943 N.W.2d 870.

Evidence of a previous sexual assault by the defendant to the same child victim was properly admitted to demonstrate motive, context, and background. Per the greater-latitude rule, courts may more readily accept proof of like occurrences of sexual assault, particularly against children.

State v. Griffin, 2019 WI App 49, ¶¶ 19–22, 388 Wis. 2d 581, 933 N.W.2d 681.

In a prosecution for reckless homicide and child abuse relating to 14-month-old twins, the trial court properly admitted cell-phone video of the defendant interacting with the twins in an abusive fashion on a prior occasion. The video evidence satisfied *Sullivan* for the following reasons:

3. It was offered for the acceptable purpose to show motive, intent, plan, and context because it demonstrated the defendant's hostile feelings.
4. It was relevant because the video was captured near in time and place to the alleged conduct.
5. It was not substantially more prejudicial than probative because the conduct shown on the video was less serious than the alleged conduct but not so similar that a jury might just presume guilt.

State v. Gee, 2019 WI App 31, 388 Wis. 2d 68, 931 N.W.2d 287.

In a prosecution of first-degree sexual-assault charges, the trial court properly ruled that evidence of a prior first-degree sexual-assault conviction would be admissible if the defendant elected to testify and attacked the accusers' credibility. The court of appeals held that Wis. Stat. § 904.04(2)(b)2. was constitutional both on its face and as applied.

State v. Reinwand, 2019 WI 25, ¶¶ 36–38, 385 Wis. 2d 700, 924 N.W.2d 184.

The court applied the three-prong *Sullivan* test, affirming the admission of a letter written by the accused admitting to an unrelated crime. The letter was offered for a permissible purpose—to rebut his claimed lack of memory with respect to the crime being tried. It was relevant to challenge his asserted memory loss and not unfairly prejudicial.

State v. Dorsey, 2018 WI 10, ¶¶ 25–35, 379 Wis. 2d 386, 906 N.W.2d 158.

Wis. Stat. § 904.04(2)(b)1., as amended in 2014, allows courts in limited types of cases—primarily those involving domestic abuse, crimes against children, and certain sexual offenses—to admit evidence of other similar acts with greater latitude under the *Sullivan* analysis. *See also State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

State v. Adamczak, 2013 WI App 150, ¶¶ 14–17, 352 Wis. 2d 34, 841 N.W.2d 311.

When the defendant was charged with sexual exploitation by a therapist in violation of Wis. Stat. § 940.22(2), testimony by two former patients, regarding inappropriate statements the defendant made to them, was inadmissible under Wis. Stat. § 904.04, because the other acts did not pass the test set forth in *State v Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). Specifically, evidence of the other acts was not offered for an acceptable purpose under Wis. Stat. § 904.04(2), and the two former patients' experiences were dissimilar from the subject allegations and therefore irrelevant.

State v. Echols, 2013 WI App 58, ¶¶ 16–20, 348 Wis. 2d 81, 831 N.W.2d 768.

In a prosecution against a school bus driver for sexual assault of a high school student, the circuit court erred by not admitting evidence of the alleged victim's "behavioral contract" in her school disciplinary records, which stated she would face expulsion for further misbehavior. Because the defendant offered evidence that the student violated a behavioral rule before she accused him, the contract was relevant to show that she might have had a motive to fabricate the assault—to divert attention from her own misconduct and thus avoid expulsion.

State v. Lock, 2012 WI App 99, ¶¶ 38–91, 344 Wis. 2d 166, 828 N.W.2d 378.

Although evidence of other bad acts is not admissible to prove the person's character and conformity with that character, in this prosecution for murder, kidnapping, and drug possession, testimony that the defendant was the head of a criminal organization involved with large drug transactions, prostitution, mortgage fraud, and robberies was properly admitted. The testimony was relevant to demonstrate the defendant's motive to keep his criminal enterprise in operation and his intent to exert his authority over those who were unwilling to cooperate in that enterprise.

State v. Vollbrecht, 2012 WI App 90, ¶¶ 29–33, 344 Wis. 2d 69, 820 N.W.2d 443.

The "identity exception" to other acts evidence requires that similarities exist between the other acts and the offense in question. The threshold measure for similarity with regard to identity is nearness of time, place, and circumstance of the other act to the crime alleged.

In this case, the defendant sought a new trial on the grounds of newly discovered evidence. The defendant was convicted for the sexual assault and murder of a woman whose body was left in a wooded area and tied to a tree with tire chains. The woman had also been shot three times in the back. There was no direct evidence of defendant's commission of the crime. The sought-to-be-admitted evidence involved a similar murder scene in an adjacent county that occurred six weeks later. That newly discovered evidence was highly probative as to identity and was not outweighed by the danger of unfair prejudice.

Dalka v. Wisconsin Cent., Ltd., 2012 WI App 22, ¶¶ 49–60, 339 Wis. 2d 361, 811 N.W.2d 834.

Concerning the knowledge (and, by extension, foreseeability) exception to the prohibition against other acts evidence, evidence of prior nonviolent trespasses in a railyard was relevant in that it made it more probable that an employer should have foreseen the specific trespass that resulted in injury to an employee.

Estate of Kriefall v. Sizzler USA Franchise, Inc., 2011 WI App 101, ¶¶ 43–46, 335 Wis. 2d 151, 801 N.W.2d 781, *aff'd on other grounds*, 2012 WI 70, 342 Wis. 2d 29, 816 N.W.2d 853.

Evidence of poor sanitary conditions at restrooms in a meat-processing plant was admissible as other acts evidence of motive, opportunity, and intent, in a case in which a child was alleged to have died as a result of consuming *E. coli*-contaminated meat when there was also evidence that human waste could contaminate meat with the *E. coli* pathogen.

State v. Jensen, 2011 WI App 3, ¶¶ 74–90, 331 Wis. 2d 440, 794 N.W.2d 482.

In a prosecution for first-degree intentional homicide, evidence of penis-focused pornography found in the defendant's home and on his home and office computers, if not other acts evidence, was properly admitted as panorama evidence. *Panorama evidence* is evidence offered to establish context—in this instance, the defendant's hostility toward his wife (the victim) and his desire to seek revenge against her for an affair.

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Authors' Note. The concept of the "panorama" of the evidence first appeared in *State v. Johnson*, 184 Wis. 2d 324, 516 N.W.2d 463 (Ct. App. 1994), in a concurring opinion. Since then, few published cases have referred to the panorama-of-the-evidence analysis. *See, e.g.*, *State v. Dukes*, 2007 WI App 175, ¶ 28, 303 Wis. 2d 208, 736 N.W.2d 515; *State v. Seefeldt*, 2002 WI App 149, ¶ 23, 256 Wis. 2d 410, 647 N.W.2d 894, *aff'd*, 2003 WI 47, 261 Wis. 2d 383, 661 N.W.2d 822.

State v. Marinez, 2011 WI 12, ¶¶ 20, 22–46, 331 Wis. 2d 568, 797 N.W.2d 399.

The defendant was charged with sexual assault of a four-year-old. During a videotaped forensic interview, the minor disclosed the alleged assault and discussed a separate incident in which the defendant allegedly burned her hands with hot water. The separate events were discussed in relation to their timing and whether the defendant perpetrated both acts.

The court determined that the videotape was properly admitted in its entirety under the three-part test developed in *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998):

1. It was admitted for the proper purposes of identifying the defendant, providing context to the time and location of the assault, and assisting the jury in assessing the minor's credibility. The court noted that a proponent's burden to satisfy the "purpose" element is not demanding because it functions largely to develop the framework for the relevance analysis. The purposes for which other acts evidence may be admitted are "almost infinite," with the only restriction being the prohibition against the admission of evidence showing the actor's propensity to commit certain acts.
2. The hand-burning evidence was relevant because, even though it did not directly relate to the elements of the sexual-assault allegation, it was consequential to the issue of the minor's credibility.
3. The evidence was highly probative because the whole case teetered on whether the minor was to be believed, and the prejudicial effect was adequately ameliorated by the circuit court's decisions to limit the details about the hand-burning incident, to provide a cautionary instruction to the jury during voir dire, and to give a cautionary instruction to the jury after closing arguments.

The court's decision was rooted in the greater-latitude rule, which permits greater latitude in admitting other acts evidence in sexual-assault cases involving young-child victims. The greater-latitude rule applies to each prong of the *Sullivan* analysis.

State v. Carter, 2010 WI App 37, ¶¶ 31–39, 324 Wis. 2d 208, 781 N.W.2d 527.

In a prosecution for being a felon in possession of a firearm and disorderly conduct while armed, other acts evidence that the defendant was "known" to carry firearms was offered for a permissible purpose, it was relevant, and its probative value was not substantially outweighed by the danger of unfair prejudice.

The permissible purpose of the evidence was to show the witness's state of mind, i.e., that she believed the item the defendant was carrying on the date in question was a gun because she knew the defendant carried guns in the past.

The evidence was relevant because it supported the basis for the witness's belief that a "click" she heard during the incident was made by a gun.

The probative value was not substantially outweighed by the danger of unfair prejudice because the record did not reflect that the evidence improperly influenced the outcome of the case.

State v. Conner, 2009 WI App 143, ¶¶ 4, 20–27, 321 Wis. 2d 449, 775 N.W.2d 105, *aff'd on other grounds*, 2011 WI 8, 331 Wis. 2d 352, 795 N.W.2d 750.

Relevant evidence that might otherwise prove character, by showing an individual has a propensity to act in a certain way, is not barred by Wis. Stat. § 904.04(2) if it is offered to support a required element of proof and is not unfairly prejudicial. Thus, evidence of a criminal defendant's prior acts of stalking was admissible to establish a "course of conduct," which is an element of the stalking offense.

State v. Payano, 2009 WI 86, ¶¶ 3, 42–104, 320 Wis. 2d 348, 768 N.W.2d 832.

In a criminal prosecution for causing reckless injury with a dangerous weapon, it was not error to admit an informant's testimony that, while at the defendant's apartment the day before the alleged offense, the informant observed the defendant packaging cocaine and saw a gun on a table next to the defendant. The prosecution advanced the informant's testimony to show context for the presence of the police (executing a no-knock search warrant), to establish a motive for the defendant to shoot (gaining time to dispose of drugs), and to negate the claim of self-defense. The defendant testified that, in defense of himself and his family, he fired a gun into the entry door of his apartment while men were attempting to break it down from the outside. He argued that the informant's testimony about the drug activity of the previous day unfairly tainted his character by portraying him to be a drug dealer.

Applying the three-part *Sullivan* test, 216 Wis. 2d 768, 576 N.W.2d 30 (1998) (see annotation in this section, *infra*), the court found that the informant's testimony comported with a purpose of Wis. Stat. § 904.04(2) (i.e., providing context, an explanation, and a motive), the evidence was relevant to a proposition of consequence (the reasonableness of defendant's belief that he was acting in self-defense), and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. (See also annotations for *Payano* in chapters 7 (Wis. Stat. §§ 904.01 and 904.02) and 8 (Wis. Stat. § 904.03), *supra*.)

Although desirable, a cautionary instruction was not required because the probative value of the evidence far outweighed the danger of unfair prejudice. Neither party requested an instruction.

State v. Normington, 2008 WI App 8, ¶¶ 14–39, 306 Wis. 2d 727, 744 N.W.2d 867.

In this prosecution for sexual assault, the defendant was accused of inserting the handle of a toilet plunger into the anus of an adult who had a developmental disability. The state sought to introduce pornographic images and videos from the accused's computer depicting objects being inserted into women's vaginas and men's and women's anuses.

Because the alleged victim had a developmental disability, the circuit court correctly applied the greater-latitude rule, applicable in determining the admissibility of other acts evidence in child-sexual-assault cases. There is no reason to conclude that the pornographic images should not be subject to the greater-latitude rule, which, until this case, had been applied only to prior sexual acts. The pornographic images otherwise satisfied the three-part *Sullivan* test.

State v. Dukes, 2007 WI App 175, ¶¶ 27–31, 303 Wis. 2d 208, 736 N.W.2d 515.

In a prosecution for keeping a drug house, as a party to the crime, the trial court properly admitted evidence of a previous drug purchase at an apartment, not as other acts evidence but as relevant evidence to show that the apartment was a drug house. "Evidence is not 'other acts' evidence if it is part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime."

State v. Muckerheide, 2007 WI 5, ¶¶ 5, 25–32, 298 Wis. 2d 553, 725 N.W.2d 930.

In a prosecution for homicide by use of a motor vehicle while having a prohibited alcohol concentration, when the defendant argued that the victim would have been killed even if the defendant had exercised due care, because the victim allegedly grabbed the steering wheel just before the accident, the trial court properly excluded evidence that the victim grabbed the steering wheel on one prior occasion. The evidence was not relevant and thus failed part two of the test set forth in *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). The opinion urges that trial courts analyze all three steps of the *Sullivan* analytical framework.

State v. McGowan, 2006 WI App 80, ¶¶ 18–23, 291 Wis. 2d 212, 715 N.W.2d 631.

In a prosecution for the sexual assault of a child by a defendant who was between the ages of 18 and 20 years old when the alleged acts occurred, evidence of the defendant's single incident of sexual assault against a different victim when the defendant was 10 years old failed parts two (relevance) and three (unfair prejudice) of the test set forth in *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), and was thus inadmissible.

State v. Missouri, 2006 WI App 74, ¶ 15, 291 Wis. 2d 466, 714 N.W.2d 595.

In a prosecution for possession of cocaine with intent to deliver and for resisting arrest, evidence of the arresting police officer's alleged mistreatment of other individuals in a number of unrelated incidents was admissible to show prejudice, a motive to lie, an intent to frame the defendant, and the lack of accident.

State v. Davis, 2006 WI App 23, ¶¶ 23–30, 289 Wis. 2d 398, 710 N.W.2d 514.

In a prosecution for several burglaries, evidence that one of the burglary victims had previously misidentified the defendant as the perpetrator was relevant to showing that the charged offenses were committed by another.

Wittig v. Hoffart, 2005 WI App 198, ¶¶ 13–14, 287 Wis. 2d 353, 704 N.W.2d 415.

In a proceeding for a second domestic abuse injunction, evidence of the respondent's conduct before the first domestic abuse injunction was relevant to predict his future conduct against the petitioner and to gauge the seriousness of his threats against her.

State v. Kimberly B., 2005 WI App 115, ¶¶ 38–41, 283 Wis. 2d 731, 699 N.W.2d 641.

In a criminal action for intentionally causing bodily harm to a child by hitting the child with a fist and an umbrella, two prior acts of hitting the same child with an extension cord or belt, even though several years apart, were admissible to show intent and to negate a defense of reasonable discipline. As to each prior act, the trial court properly conducted an analysis, under *State v. Speer*, 176 Wis. 2d 1101, 501 N.W.2d 429 (1993) (annotated in this chapter, *infra*), and gave special instructions to the jury. The jury was instructed that it must not consider other acts evidence to conclude that the defendant had a bad character or that she had acted "in conformity therewith" to commit the crime.

State v. Franklin (In re Commitment of Franklin), 2004 WI 38, ¶¶ 8–14, 270 Wis. 2d 271, 677 N.W.2d 276.

Wis. Stat. § 904.04(2) is not applicable when evaluating the admissibility of evidence that is offered in a Wis. Stat. ch. 980 proceeding.

State v. White, 2004 WI App 78, ¶¶ 14–16, 20, 271 Wis. 2d 742, 680 N.W.2d 362.

It was error for the trial court to conclude that a witness's assertion that the alleged robbery victim, a store clerk, "was stealing from the store" was inadmissible at the trial of the defendant who was charged with committing the robbery. The evidence was not barred by Wis. Stat. § 904.04(2) because it showed the clerk's opportunity and intent. Also, because the evidence went to the core of the defendant's defense, its probative value was not "substantially outweighed" by any of the Wis. Stat. § 904.03 considerations.

The court applied the same analysis to conclude that evidence that the clerk had sold marijuana at the store was admissible.

State v. Wright, 2003 WI App 252, ¶¶ 43–45, 268 Wis. 2d 694, 673 N.W.2d 386.

A witness's testimony was not admissible as other acts evidence of a third-party perpetrator under *State v. Scheidell*. Under *Scheidell*, a three-step analytical framework is applied when a defendant, on the issue of identity, offers evidence of other acts committed by an unknown third party. First, the court must determine whether the other acts evidence is offered for a permissible purpose under Wis. Stat. § 904.04(2), such as to

establish motive, opportunity, plan, knowledge, or identity. Second, the court must determine whether the other acts evidence is relevant, in that it relates to a fact that is of consequence to the determination of the action. Third, the court must determine whether the probative value of the offered testimony has the tendency to make a consequential fact more or less probable than it would be without the evidence.

Thus, when the testimony of a witness merely showed that he could not identify the defendant as a robber but did not demonstrate that the defendant could not have committed the offense, the testimony did not tend to make a consequential fact more or less probable than it would be absent his testimony and was not competent other acts evidence.

State v. Hunt, 2003 WI 81, ¶¶ 32, 54–75, 83–88, 263 Wis. 2d 1, 666 N.W.2d 771.

The *Sullivan* test, which provides circuit courts with an analytical framework for deciding the admissibility of other acts evidence, asks the court to consider (1) whether the evidence is offered for a permissible purpose; (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay. In a prosecution for multiple sex offenses, evidence of the defendant's use of crack cocaine and prior abuse of his wife was permissibly received for the purpose of establishing the context for sexual assault crimes involving other household members.

Wisconsin courts permit a more liberal admission of other crimes evidence in sexual-assault cases. Although the greater-latitude rule supports the more liberal standard of admissibility in child-sexual-assault cases, it does not relieve the court of the duty to ensure that the other acts evidence is offered for a proper purpose under Wis. Stat. § 904.04(2).

State v. Quinsanna D. (In re Termination of Parental Rts. to Teyon D.), 2002 WI App 318, ¶¶ 25–26, 259 Wis. 2d 429, 655 N.W.2d 752.

In a termination of parental rights proceeding, evidence of a parent's prior crimes was admissible to prove that she had failed to assume parental responsibility for her children.

State v. Volk, 2002 WI App 274, ¶¶ 20–22, 258 Wis. 2d 584, 654 N.W.2d 24.

For the purpose of determining the probative value of other acts evidence, the second aspect of the second prong of the *Sullivan* test does not require the defendant's prior conduct to be exactly similar to the alleged offense. Instead, *Sullivan* looks to the strength of the similarity. In a domestic violence case involving injury to the victim's throat and tongue, evidence of the defendant's prior abuse of his former spouse, including strikes to the head and choking, satisfied the second prong of the *Sullivan* test.

State v. Barreau, 2002 WI App 198, ¶¶ 29, 34–41, 257 Wis. 2d 203, 651 N.W.2d 12.

In a prosecution for first-degree intentional homicide, robbery with the use of force, and burglary while armed with a dangerous weapon, evidence of the adult defendant's breaking into an empty house for the purpose of stealing money when he was 13 years old, 6 years before the charged crimes, was not probative of the defendant's intent to steal.

State v. Seefeldt, 2002 WI App 149, ¶¶ 20–23, 256 Wis. 2d 410, 647 N.W.2d 894, *aff'd*, 2003 WI 47, 261 Wis. 2d 383, 661 N.W.2d 822.

When the defendant had been arrested for possession of controlled substances after a high-speed chase in which he was a passenger in the fleeing vehicle, evidence of outstanding arrest warrants on the driver would have been proper to show the driver's motive to flee.

State v. Opalewski, 2002 WI App 145, ¶¶ 15–19, 256 Wis. 2d 110, 647 N.W.2d 331.

In a case for first-degree sexual assault of a child and incest with a child involving the defendant's 5-year-old daughter, evidence that the defendant had sexually assaulted two of his other daughters more than 25 years earlier and the children of his girlfriend more than 15 years before the charged offense was admissible to show proof of intent, motive, and absence of mistake.

State v. Veach, 2002 WI 110, ¶ 118, 255 Wis. 2d 390, 648 N.W.2d 447.

Wallerman stipulations, i.e., stipulations to certain elements of the charged offense to avoid the introduction of other acts evidence, are not invalid per se. With the exception of a stipulation to the defendant's status, however, the state and the court are not obligated to accept stipulations to elements of a crime even if such stipulations are offered in compliance with *Wallerman*'s four-part test.

> ***Authors' Note.*** *Veach* explicitly overrules *State v. Wallerman*, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996), and *State v. DeKeyser*, 221 Wis. 2d 435, 585 N.W.2d 668 (Ct. App. 1998), to the extent that those cases imply that the state and the circuit court are obligated to accept a *Wallerman* stipulation.

State v. Head, 2002 WI 99, ¶¶ 126–129, 255 Wis. 2d 194, 648 N.W.2d 413.

In a prosecution for first-degree intentional homicide, evidence of the victim's prior violent acts that were personally known to the defendant was admissible pursuant to *McMorris v. State*, 58 Wis. 2d 144, 205 N.W.2d 559 (1973), when the defendant had sufficiently raised the issue of self-defense. As a general rule, such evidence cannot be used to support an inference about the victim's actual conduct during the incident but can be admitted as bearing on the reasonableness of the defendant's apprehension at the time of the incident.

Mucek v. Nationwide Commc'ns, Inc., 2002 WI App 60, ¶¶ 38–43, 252 Wis. 2d 426, 643 N.W.2d 98.

Evidence of a defendant's prior lawsuits, of complaints filed against the defendant with the attorney general's office, and of a newspaper article criticizing the defendant were admissible for the purpose of demonstrating the egregiousness of the defendant's conduct, which was relevant to the jury's determination of punitive damages.

State v. Frank, 2002 WI App 31, ¶¶ 4–19, 250 Wis. 2d 95, 640 N.W.2d 198.

A trial court's ruling that other acts evidence is admissible does not require a defendant to enter into a *Wallerman* stipulation. By entering into a *Wallerman* stipulation and rendering other acts evidence inadmissible, a defendant waives the right to appeal the other acts ruling. Other acts evidence must be introduced at trial before a criminal defendant may argue reversible error.

State v. Gribble, 2001 WI App 227, ¶¶ 36–48, 248 Wis. 2d 409, 636 N.W.2d 488.

In a prosecution for first-degree reckless homicide involving the death of an infant, evidence of a prior injury sustained by the victim and of prior injuries sustained by another child while in the defendant's care were admissible to show motive and intent. Although no convictions had resulted from the defendant's alleged prior conduct, the trial court found that the evidence of the alleged acts was sufficient for a reasonable jury to find by a preponderance of the evidence that the defendant had caused the injuries.

State v. Meehan, 2001 WI App 119, ¶¶ 8–17, 244 Wis. 2d 121, 630 N.W.2d 722.

In a prosecution for the second-degree sexual assault of a child and a count of attempted second-degree sexual assault of a child, evidence of a previous conviction for sexual assault of an adult man was not probative of the defendant's motive, opportunity, or plan, because the previous assault did not demonstrate sufficient similarities of time, place, and circumstance. Although *State v. Hammer*, 2000 WI 92, 236 Wis. 2d 686, 613 N.W.2d 629, demonstrates that the adult/minor victim distinction between present allegations and prior bad acts does not preclude the admission of other acts evidence, a similarity in age, and more importantly, similarity in events, control. Here, the other act was substantially dissimilar from the charged act, which reduced the probative value of the other act evidence.

State v. Hammer, 2000 WI 92, ¶¶ 21–34, 236 Wis. 2d 686, 613 N.W.2d 629.

In a prosecution for second-degree sexual assault of a child and fourth-degree sexual assault, evidence of an allegation of a previous assault, occurring seven years earlier, of a teenage child approximately the same age as the victims in this case, was admissible under the greater-latitude rule, using the *Sullivan* test. The allegation of the previous assault involved a victim assaulted during the night while the victim was unconscious or asleep, which coincided with the allegations in this case. Also, the victims in both incidents involved same-sex victims, and the defendant was homosexual. Evidence of the alleged prior act was relevant to show motive, mode or method of operation, identity, and absence of mistake.

State v. Bauer, 2000 WI App 206, ¶¶ 1–2, 7 & n.2, 238 Wis. 2d 687, 617 N.W.2d 902.

In a prosecution for attempted first-degree intentional homicide, in which the prosecution advanced evidence that the defendant later solicited the murder of his wife and a friend who were going to testify against him, that evidence was mistakenly considered to be other acts evidence. Rather, that evidence should be categorized as being relevant to consciousness of guilt of the principal criminal charge. Simply because an act can be eventually classified as different in time, place, and manner from the charged conduct does not make it other acts evidence.

State v. Cofield, 2000 WI App 196, ¶¶ 7–14, 238 Wis. 2d 467, 618 N.W.2d 214.

In a prosecution for first-degree sexual assault, in which the accused was alleged to have assaulted a woman at knifepoint and the act consisted of both penis-to-vagina and mouth-to-penis intercourse, evidence of the previous convictions of sexual assault involving two knifepoint assaults, approximately 10 years earlier, one involving both penis-to-vagina and mouth-to-penis intercourse, the other attack being interrupted, were not admissible to show the defendant's intent, motive, common scheme, or plan. The evidence was not admissible to show intent, because intent was not an element of the offense charged. The evidence was not admissible to show a common scheme or plan, because there was no showing that the prior acts were a step in a plan leading to the charged offense.

State v. Koeppen, 2000 WI App 121, ¶¶ 25–28, 237 Wis. 2d 418, 614 N.W.2d 530.

In a prosecution for failure to comply with an officer while being taken into custody, evidence of the defendant's arrest for disorderly conduct three years earlier, at the same home in which the defendant was arrested in this case, was offered "to explain why officers felt compelled to use [a chemical] spray, as well as a flash bang device" to arrest him and to show that the defendant knew his actions were unlawful. This prior acts evidence was admissible to prove intent or absence of mistake, because the defendant contended that he did not try to prevent officers from taking him into custody; rather, he simply refused to obey their commands that he come out. Prior acts evidence is appropriately used to undermine an innocent explanation for charged conduct.

State v. Davidson, 2000 WI 91, ¶¶ 45–62, 236 Wis. 2d 537, 613 N.W.2d 606.

In a prosecution for the sexual assault of a 13-year-old girl, evidence of the defendant's previous conviction for sexually assaulting a 6-year-old girl was admissible to show motive, plan, and common scheme. The evidence was admissible for the purpose of establishing motive because the defendant's purpose or motive for allegedly touching the victim was an element of the charged crime. The evidence was admissible to establish plan or scheme because there was a concurrence of common elements between the two incidents, including that each victim was

particularly vulnerable at the time of the attack, both offenses took place in unlikely locations in which the defendant could easily have been apprehended during the commission of the offense, and both assaults involved touching girls between the legs.

Also, the greater-latitude rule, which permits a greater latitude of proof with regard to other acts evidence in sexual-assault cases, particularly those involving child victims, is to be applied to each step in the three-step test for admissibility of other acts evidence articulated in *State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998).

State v. Anderson, 230 Wis. 2d 121, 127–33, 600 N.W.2d 913 (Ct. App. 1999).

In a prosecution for murder, when evidence was presented that the accused allegedly stated during the commission of the crime that "a dead bitch can't say anything," evidence of the accused's previous conviction and sentence to prison for sexual assault was admissible as being relevant to the accused's motive and intent to silence the victim by murder, thereby providing context to the statement.

State v. Gray, 225 Wis. 2d 39, 48–65, 590 N.W.2d 918 (1999).

In a prosecution of an individual charged with attempting to obtain and obtaining a controlled substance by misrepresentation (forgery), it was appropriate to admit evidence of a previous conviction for obtaining a controlled substance by misrepresentation and evidence of other uncharged forged prescriptions to show motive, identity, common plan, and absence of mistake, using the analytical framework set forth in *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

State v. Scheidell, 227 Wis. 2d 285, 305–06, 595 N.W.2d 661 (1999).

When evidence of a similar crime committed by an unknown third party is sought to be introduced by a defendant on the issue of identity, the court must balance the probity of the evidence, considering the similarities between the other act and the crime alleged, against the considerations contained in Wis. Stat. § 904.03, using the framework set forth in *Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967), and *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

State v. DeKeyser, 221 Wis. 2d 435, 446–51, 585 N.W.2d 668 (Ct. App. 1998), *overruled in part by State v. Veach*, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447.

In the prosecution of a defendant for sexual contact with his 15-year-old granddaughter, evidence of a different granddaughter's allegation of sexual contact by the defendant in a separate incident with her 4 years earlier should not have been admitted. Evidence of the alleged prior act was not relevant to establish identity or mistake, because the defendant had raised neither defense. Nor was the evidence relevant as to whether the defendant had a plan, because there was insufficient similarity between the prior act and the offense charged. For the prior act to be relevant plan evidence, the state would have had to establish that, at the time of the earlier alleged incident of sexual contact with one granddaughter, the defendant also intended eventually to violate the other granddaughter.

State v. Sullivan, 216 Wis. 2d 768, 773–74, 781–92, 576 N.W.2d 30 (1998).

Before ruling on the admissibility of other acts evidence, the court must engage in a three-step analysis and "carefully articulate" its reasoning on the record. The three steps require the court to (1) determine whether the evidence is offered for an acceptable purpose under Wis. Stat. § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; (2) determine relevance by (a) first deciding whether the evidence relates to a fact or proposition that is of consequence to the determination of the action, and (b) deciding whether the evidence has probative value (i.e., whether the evidence has a tendency to make the consequential act or proposition more probable or less probable than it would be without the evidence); and (3) determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, etc., under Wis. Stat. § 904.03.

In a prosecution for a defendant's battery of his girlfriend, evidence of a prior domestic disturbance between the defendant and his former wife was not admissible as other acts evidence. Although the evidence satisfied the first step of the applicable analysis, it failed under the second step. The prior disturbance, which involved no physical contact, was not probative of the defendant's intent or absence of accident in the subsequent battery incident.

> ***Authors' Note.*** *Sullivan* remains the standard for evaluating other acts evidence under Wis. Stat. § 904.04. See, e.g., *State v. Dorsey*, 2018 WI 10, 379 Wis. 2d 386, 906 N.W.2d 158, annotated above. *Sullivan* represented a tightening of the criteria as to the admissibility of other acts evidence by requiring the trial court to "carefully articulate" its reasoning process as to each step.

State v. Wallerman, 203 Wis. 2d 158, 167–68, 552 N.W.2d 128 (Ct. App. 1996), *overruled in part by State v. Veach*, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447.

Wisconsin applies a four-part test in determining whether to allow a defendant's offer to stipulate to or concede certain elements necessary for the state to prove its case in an attempt to avoid the state's entry of other acts evidence. First, the trial court should carefully explore the breadth of the defendant's offer, to determine exactly what the defendant is conceding. Second, the trial court must assess whether the state's other acts evidence would still be relevant to the other elements of the crime that the defendant still contests. Third, the trial court should personally voir dire the lawyers and the defendant to ensure that they each understand the effects of the concession. In particular, the defendant must understand that the state will rely on the concession to prove its case, and that the court will instruct the jury on the concession. The defendant must know

that he or she has waived the right to produce evidence and make argument about that element. Finally, a defendant's stipulations should be addressed before trial, if possible.

State v. Jeske, 197 Wis. 2d 905, 911–15, 541 N.W.2d 225 (Ct. App. 1995).

Oral statements may be admissible as other acts evidence even when they are not acted on. However, determinations about the admissibility of such evidence are within the discretion of the trial court. In this case, the trial court did not err in excluding the defendant's sexually suggestive statements allegedly made to the sexual-assault victim's sister one year before the alleged assault; a reasonable judge could conclude that their probative value could be substantially outweighed by their prejudicial effect.

The purpose of the several exceptions to Wis. Stat. § 904.04(2) is to draw a distinction between a plan or scheme and a mere propensity or leaning toward some forbidden act, making the former admissible and the latter inadmissible.

State v. Rushing, 197 Wis. 2d 631, 646–48, 541 N.W.2d 155 (Ct. App. 1995).

When the state did not need to prove intent as an element of the crime of sexual assault of a minor, evidence of the defendant's prior consensual sex with an adult male could not be admitted to show intent.

The standards of probativeness and relevance are stricter when other acts evidence is used to show identity because of the greater danger for prejudice to the defendant. In determining whether the other act should be entered as proof of identity, the trial court must measure the nearness of time, place, and circumstances of the other act to the crime alleged. A defendant's prior homosexual encounter with a consenting adult cannot be introduced to suggest that the defendant is also likely to assault a sleeping child. The other act, while occurring near in time to the alleged sexual assault, was completely dissimilar in nature.

State v. Hereford, 195 Wis. 2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995).

Testimony of other acts that is offered to provide the background or context of a case is not prohibited by Wis. Stat. § 904.04(2). Thus, in a homicide prosecution, testimony from the defendant's grandmother that she had seen a gun in the defendant's car similar to the type of gun used in the commission of the crime a few weeks later was admissible to give context to the defendant's statement, "I am going to get my shit," made as he went to his car moments before the shooting.

State v. Tabor, 191 Wis. 2d 482, 490–95, 529 N.W.2d 915 (Ct. App. 1995).

The other crimes evidence in this case, a conviction for sexual assault of a child approximately nine years earlier, was properly admitted to show motive (the desire for sexual gratification). Remoteness in time does not render evidence inadmissible per se. Wisconsin adheres to the greater-latitude rule in child-sexual-assault cases. This rule provides for a relaxed admission of other crimes evidence, particularly in cases involving incest and indecent liberties with a child. Evidence still must fit under one of the exceptions to Wis. Stat. § 904.04(2); the rule does not allow for other crimes evidence to prove a deviant character trait of the defendant.

Authors' Note. *But see* Wis. Stat. § 904.04(2)(b) (greater latitude), *as amended by* 2013 Wis. Act 362.

State v. Landrum, 191 Wis. 2d 107, 118–123, 528 N.W.2d 36 (Ct. App. 1995).

Evidence of other crimes, wrongs, or acts is not prohibited merely because the person against whom such evidence is proffered was acquitted of the other act in a proceeding in which the burden of proof was guilt beyond a reasonable doubt. Other act evidence is relevant if a reasonable jury could find by a preponderance of the evidence that the defendant committed the other act.

Authors' Note. This is a troubling holding. Because of the language of Wis. Stat. § 904.04(2), convictions of some crimes are admissible. However, the authors believe that in most cases in which a person has been acquitted of a crime, evidence of that act is likely to be excludable under Wis. Stat. § 904.03. The probative value of an act that was not accepted by a jury as a basis for conviction is likely to be substantially outweighed by both considerations of unfair prejudice and undue delay. To allow introduction of such evidence would in most cases require relitigation of those issues already litigated in the prior trial.

State v. Speer, 176 Wis. 2d 1101, 1114–15, 501 N.W.2d 429 (1993).

Once an appropriate objection has been made to the admission of other crimes evidence, the burden is on the proponent of the evidence to show that the other crimes evidence is relevant to one or more of the named admissible purposes. If the proponent establishes relevance for an admissible purpose, the evidence will be admitted unless the opponent of the evidence can show that the probative value of the other crimes evidence is substantially outweighed by the danger of unfair prejudice.

Probative value of other crimes evidence depends in part on its nearness in time, place, and circumstances to the crime or element sought to be proved. The term "substantially" indicates that if the probative value of the evidence is close or equal to the unfair prejudicial effect, the evidence must be admitted, and in this sense the rules may be said to favor admission. However, there is no presumption against or in favor of the admissibility of other crimes evidence. The admissibility of other crimes evidence is controlled by the court's neutral and discretionary application of the evidence rules.

The defendant's conviction two years earlier of a daytime burglary of a home with a "For Sale" sign in the front yard was admissible in this case involving the daytime burglary of a home with a "For Sale" sign.

State v. Plymesser, 172 Wis. 2d 583, 594, 493 N.W.2d 367 (1992).

A prior act is admissible under Wis. Stat. § 904.04(2) if the motive for the earlier crime is used to show a common cause for both the earlier and the later crime and it is argued that the same motive caused both acts. Evidence of the defendant's conviction for sexual assault of a child 13 years earlier was properly admitted to show motive when the defendant was charged with sexual assault of a child. The greater-latitude standard for sex crimes is set forth in *State v. Grande*, 169 Wis. 2d 422, 433, 485 N.W.2d 282 (Ct. App. 1992).

Evidence of a sexual assault was admissible under Wis. Stat. § 904.04(2) when offered to prove the defendant's intent to hold the victim to service against her will, an element of a kidnapping charge against the defendant.

State v. Kuntz, 160 Wis. 2d 722, 747, 749, 467 N.W.2d 531 (1991).

In a prosecution for arson and first-degree murder, evidence of uncharged misconduct involving arson by the defendant occurring 11 and 16 years earlier was admissible because the circumstances in each instance were strikingly similar to the charged crime (threat to use fire was made after a marriage ended). However, the standards of probativeness and relevance are stricter when other acts evidence is used because of the greater prejudice that usually accompanies such evidence.

State v. Roberson, 157 Wis. 2d 447, 454–55, 459 N.W.2d 611 (Ct. App. 1990).

To show knowledge or plan, the evidence of other crimes, wrongs, or acts must have occurred before the event for which the defendant is charged.

To show intent, however, the act sought to be admitted may occur after the crime for which the defendant is charged because intent evidence undermines the probability of an innocent intent. Thus, evidence of the defendant's subsequent possession of a stolen vehicle was admissible on the issue of intent and not knowledge or plan when the defendant claimed that he innocently possessed a stolen engine.

State v. Kimpel, 153 Wis. 2d 697, 703–04, 451 N.W.2d 790 (Ct. App. 1989).

Other wrongs evidence is not limited solely to a defendant's acts. For example, in a criminal proceeding in which a defendant claims self-defense, the defendant may be able to introduce evidence of other wrongs of the complaining party to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

State v. McAllister, 153 Wis. 2d 523, 529, 451 N.W.2d 764 (Ct. App. 1989).

When a prior conviction of a felony is an element of the offense with which the defendant is charged and the defendant is willing to stipulate to being a convicted felon, evidence of the nature of the felony is precluded by Wis. Stat. § 904.04(2) if the prior conviction is offered solely to establish the felony conviction element of the offense.

State v. Pence, 150 Wis. 2d 759, 768–69, 442 N.W.2d 540 (Ct. App. 1989).

When entrapment is a defense, the issue of predisposition is probably a "state of mind at a particular time" rather than a more general character issue and, as such, evidence regarding it may come in under Wis. Stat. § 904.04(2). Acts occurring after the charged offense are not per se inadmissible on this issue.

State v. Schindler, 146 Wis. 2d 47, 53, 429 N.W.2d 110 (Ct. App. 1988).

It is unnecessary for the trial court to make a preliminary finding that the prior act occurred. The trial court neither weighs credibility nor makes a finding that the state has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence and decides whether the jury could reasonably find the conditional fact by a preponderance of the evidence.

Because Wis. Stat. § 904.04(2) was identical to its counterpart in the Federal Rules of Evidence, the court adopted the federal analysis.

State v. Evers, 139 Wis. 2d 424, 435, 443–44, 407 N.W.2d 256 (1987).

The general rule excluding evidence of prior acts of the defendant is predicated on the fundamental principle of justice that a bad person no more than a good one ought to be convicted of a crime not committed by the person. When considering intent, the crucial factor that makes other acts evidence probative is the similarity of the prior acts. Unless the crimes are similar, the inference of intent can arise only if the inference of bad character is first drawn.

The intent exception is based on the doctrine of chances. If a like occurrence takes place enough times, it can no longer be attributable to mere coincidence. Such an inference cannot reasonably come into play, however, when the circumstances surrounding the prior acts are neither known nor mentioned to the jury so that they can be evaluated. The knowledge acquired must be more than the knowledge that it is wrong to commit crimes.

The justification for the knowledge exception is similar. Thus, the prior act must have resulted in a defendant being more likely to have had the state of knowledge that is in dispute in the charged case.

State v. Fishnick, 127 Wis. 2d 247, 256, 261–62, 378 N.W.2d 272 (1985).

In a trial for the first-degree sexual assault of a 3-year-old, the attempted enticement by the defendant of a 12-year-old girl a few days earlier was sufficiently similar to be admitted regarding the motive of sexual gratification, if accompanied by limiting jury instructions.

The "propensity to act out his sexual desires" language in *State v. Tarrell*, 74 Wis. 2d 647, 247 N.W.2d 696 (1976), is withdrawn.

State v. Rutchik, 116 Wis. 2d 61, 75, 341 N.W.2d 639 (1984).

Evidence regarding a similar crime that had occurred three years before was not so remote as not to be probative of the defendant's intent, even though temporal proximity is an important factor in assessing the probative prior criminal acts. In assessing the effect of the passage of time on the relevance of prior crimes as evidence, the period of confinement will not be included in computing the time between incidents. In this case, during two of the three years, the defendant had been incarcerated.

Authors' Note. See the dissent for an analysis of the application of Wis. Stat. § 904.04(2).

State v. Pharr, 115 Wis. 2d 334, 343–46, 340 N.W.2d 498 (1983).

In determining whether other crimes evidence is admissible, a two-prong test is applied. First, does it fit within an exception in Wis. Stat. § 904.04(2)? Second, is the probative value of the evidence substantially outweighed by the danger of unfair prejudice to the defendant?

To be a "plan" under Wis. Stat. § 904.04(2), there must be such a concurrence of common features that the various acts are materially to be explained as caused by a general plan of which they are the individual manifestations. Any fact that tends to prove a material issue is relevant, even though it is only a link in the chain of facts that must be proved to make the proposition at issue appear more or less probable. Relevance is not determined by a resemblance to, but by the connection with, other facts. As such, evidence of a subsequent shooting in the course of flight was relevant to show that the defendant was a participant in a shooting rather than an innocent bystander.

State v. Balistreri, 106 Wis. 2d 741, 756–57, 317 N.W.2d 493 (1982).

Motive and plan are closely related concepts. Motive explains the reason for a person's actions, and plan explains the deliberate steps taken by the person to accomplish the purpose. For a "plan" to exist, there must be such a concurrence of common features that the various acts are materially to be explained as caused by a general plan of which they are the individual manifestations. Also, evidence of other crimes is not to be admitted merely to show that a person acted in conformity with a general criminal disposition to violence.

State v. Bettinger, 100 Wis. 2d 691, 697–98, 303 N.W.2d 585 (1981).

Other crimes evidence is admissible to complete the story of the crime at trial by proving the immediate context of happenings near in time and place. Such evidence is likewise permissible to prove motive. It is generally acknowledged that evidence of criminal acts of an accused that are intended to obstruct justice or avoid punishment is admissible to prove a consciousness of guilt of the principal charge.

Vanlue v. State, 87 Wis. 2d 455, 462, 275 N.W.2d 115 (Ct. App. 1978), *rev'd on other grounds*, 96 Wis. 2d 81, 291 N.W.2d 467 (1980).

If counsel has objected to evidence of other crimes and the objection is overruled, counsel does not waive the objection by bringing the material out personally. To put the evidence in personally or let the state put it in is no election at all.

State v. Spraggin, 77 Wis. 2d 89, 99–101, 252 N.W.2d 94 (1977).

The word "plan" in Wis. Stat. § 904.04(2) must be given a limited meaning. There must be a concurrence of common features of the various acts. If the evidence sought to be received is not an individual manifestation of the crime charged, then it is inadmissible.

Before reaching the question whether the evidence's possible probative value is outweighed by its prejudice, the court must first determine that the evidence is offered for a valid purpose, e.g., intent, plan, etc.

When evidence of other crimes is admitted, the court should admonish the jury or give a curative or limiting instruction indicating that the evidence is not proof of guilt but only proof of the element for which it is offered.

See also ....

State v. Bush, 2005 WI 103, ¶ 33, 283 Wis. 2d 90, 699 N.W.2d 80 (Wis. Stat. § 904.04(2) does not apply to Wis. Stat. ch. 980; rather, totality of defendant's past actions examined to determine whether mental condition predisposes defendant to commit another sexually violent act)

Smith v. Golde, 224 Wis. 2d 518, 531–33, 592 N.W.2d 287 (Ct. App. 1999) (other acts evidence may be admitted for the purpose of supporting a claim for punitive damages)

State v. Bustamante, 201 Wis. 2d 562, 576–77, 549 N.W.2d 746 (Ct. App. 1996) (affirming admission of other acts evidence concerning defendant's abuse of one child, to negate defendant's statements to police officers suggesting he accidentally caused different child's death)

State v. La Bine, 198 Wis. 2d 291, 298–300, 542 N.W.2d 797 (Ct. App. 1995) (affirming admission at homicide trial of defendant's prior unsuccessful theft of victim's truck, when victim's thwarting of that theft supported defendant's motive and intent to kill her and contradicted his defense of accident)

State v. Johnson, 184 Wis. 2d 324, 338, 516 N.W.2d 463 (Ct. App. 1994) (evidence properly admitted to show motive to falsely accuse)

State v. Clark, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993) (evidence properly admitted to show intent)

State v. Davis, 171 Wis. 2d 711, 723, 492 N.W.2d 174 (Ct. App. 1992) (evidence properly admitted to show intent to defraud)

State v. Mordica, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992) (evidence of prior statement admissible to explain prior incriminating remarks)

State v. Clemons, 164 Wis. 2d 506, 513–14, 476 N.W.2d 283 (Ct. App. 1991) (evidence of prior theft admissible as aspect of charged crime)

State v. Bergeron, 162 Wis. 2d 521, 530, 470 N.W.2d 322 (Ct. App. 1991) (evidence of prior alias admissible as background)

State v. Daniels, 160 Wis. 2d 85, 95, 108, 465 N.W.2d 633 (1991) (evidence of victim's prior violent acts admissible when self-defense claimed by defendant)

Lievrouw v. Roth, 157 Wis. 2d 332, 349–50, 459 N.W.2d 850 (Ct. App. 1990) (if probative value not substantially outweighed by unfair prejudice, evidence of prior drunk driving admissible in negligence action on issue of punitive damages to show awareness of dangers of driving while intoxicated)

State v. Amos, 153 Wis. 2d 257, 274, 450 N.W.2d 503 (Ct. App. 1989) (statutory list of permissible purposes is illustrative, not exclusive)

State v. C.V.C., 153 Wis. 2d 145, 160–62, 450 N.W.2d 463 (Ct. App. 1989) (prior threats against victim admissible to show victim's alleged consent in sexual-assault prosecution)

State v. Jones, 151 Wis. 2d 488, 493–94, 444 N.W.2d 760 (Ct. App. 1989) (evidence of prior assaults admissible to show motive, plan, or scheme)

State v. Friedrich, 135 Wis. 2d 1, 22, 398 N.W.2d 763 (1987) (when crime includes element of purpose of sexual arousal or gratification, then other acts evidence tending to show defendant's motive is properly admissible)

State v. Danforth, 129 Wis. 2d 187, 203, 385 N.W.2d 125 (1986) (evidence of prior acts inadmissible to show intent when intent is not an element of the charged crime)

State v. Harris, 123 Wis. 2d 231, 235–39, 365 N.W.2d 922 (Ct. App. 1985) (other acts evidence is inadmissible if point to be proved—e.g., identity, plan, etc.—is not at issue and should not be used if other proof is available)

State v. Goldsmith, 122 Wis. 2d 754, 756–57, 364 N.W.2d 178 (Ct. App. 1985) (listing bases for general exclusion of other acts evidence: (1) tendency to believe defendant guilty merely because of likelihood to do charged acts, (2) tendency to condemn because of escaped punishment from other offenses, (3) injustice of attacking defendant unable to challenge fabricated evidence, and (4) potential confusion of issues)

State v. Sonnenberg, 117 Wis. 2d 159, 172–74, 344 N.W.2d 95 (1984) (relevance of other conduct evidence depends on its nearness in time, place, and circumstance to alleged crime and on disputed elements to be proved)

State v. Shillcutt, 116 Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983), *aff'd*, 119 Wis. 2d 788, 350 N.W.2d 686 (1984) (statutory listing is not exclusionary)

State v. Hoffman, 106 Wis. 2d 185, 212, 316 N.W.2d 143 (Ct. App. 1982) (evidence admissible to show state of mind or plan)

State v. Cartagena, 99 Wis. 2d 657, 670, 299 N.W.2d 872 (1981) (evidence of prior conduct admissible to show depraved mind if not too remote)

Vanlue v. State, 96 Wis. 2d 81, 87–88, 291 N.W.2d 467 (1980) (evidence of prior conviction admissible to show intent)

Simpson v. State, 83 Wis. 2d 494, 511, 266 N.W.2d 270 (1978) (subsection not limited to other criminal acts, though criminal acts must be scrutinized more closely because of increased potential for unfair prejudice)

Holmes v. State, 76 Wis. 2d 259, 270, 251 N.W.2d 56 (1977) (evidence admissible to show intent)

King v. State, 75 Wis. 2d 26, 41–45, 248 N.W.2d 458 (1977) (party not limited to producing evidence of prior conduct in case-in-chief; such evidence may be offered in rebuttal, if rebuttal proper)

904.05 Methods of proving character.

(1) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(2) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.

Judicial Council Committee's Note (1974)

Sub. (1). This subsection would permit opinion evidence of character which is not now permitted in Wisconsin, *Schultz v. State*, 133 Wis. 215, 113 N.W. 428 (1907). See cases cited at, and comment to s. 906.08(1).

Sub. (2). This subsection is consistent with Wisconsin cases: chastity in sexual seduction or assault cases, *Ward v. Thompson*, 146 Wis. 376, 131 N.W. 1006 (1911); *Barton v. Bruley*, 119 Wis. 326, 96 N.W. 815 (1903); *Stewart v. Smith*, 92 Wis. 76, 65 N.W. 736 (1896); *Watry v. Ferber*, 18 Wis. 500, 86 Am. Dec. 789 (1864); incompetence of employee in action against employer for retaining an incompetent employee, *Moering v. Falk Co.*, 141 Wis. 294, 124 N.W. 402, 18 Ann. Cas. 926 (1910); incompetent auto driver in action against parent-owner of auto, *Dormeyer v. Hall*, 192 Wis. 197, 212 N.W. 257 (1927); stealing or bribery in defamation cases, *Bilgrien v. Ulrich*, 150 Wis. 532, 137 N.W. 759 (1912); *Kimball v. Fernandez*, et al., 41 Wis. 329 (1877); *Talmadge v. Baker*, 22 Wis. 625 (1868); *Lowe v. Ring*, 123 Wis. 107, 101 N.W. 381 (1904). Also see *Earley v. Winn*, 129 Wis. 291, 296, 109 N.W. 633, 635 (1906).

Case Annotations

(1) Reputation or Opinion

State v. Richard A.P., 223 Wis. 2d 777, 793, 589 N.W.2d 674 (Ct. App. 1998).

Evidence of a defendant's character, for the purpose of demonstrating a lack of sexual disorders or deviancy, may be presented through testimony as to reputation or by testimony in the form of an opinion.

State v. Bedker, 149 Wis. 2d 257, 269, 440 N.W.2d 802 (Ct. App. 1989).

Testimony that a person has never been convicted of a crime is not reputation testimony or testimony in the form of an opinion and, therefore, is not admissible under Wis. Stat. § 904.05(1).

State v. Boykins, 119 Wis. 2d 272, 279, 350 N.W.2d 710 (Ct. App. 1984).

When there is a sufficient factual basis to raise the issue of self-defense, and the violent character of the victim is an essential element of the defense, proof of the victim's reputation for being violent is relevant and admissible.

Werner v. State, 66 Wis. 2d 736, 743–45, 226 N.W.2d 402 (1975).

A defendant may testify as to the defendant's personal knowledge of prior specific acts of violence by the victim. The purpose of allowing such testimony is not to support an inference about the victim's actual conduct during the incident; rather it relates to the defendant's state of mind regarding the victim's character. The rationale for this rule specifically prohibits the testimony of witnesses other than the defendant regarding specific prior incidences of the victim's violent conduct.

See also ....

Prahl v. Brosamle, 98 Wis. 2d 130, 156, 295 N.W.2d 768 (Ct. App. 1980) (esteem in which one person holds another does not establish reputation in the community)

(2) Specific Instances of Conduct

State v. Wenger, 225 Wis. 2d 495, 504–11, 593 N.W.2d 467 (Ct. App. 1999).

In support of a properly raised claim of self-defense, a defendant may introduce evidence of the victim's violent character to establish the defendant's own state of mind at the time of the charged offense by proving prior specific instances of violence within the defendant's knowledge at the time of the offense. The defendant's proof of the victim's prior violent acts of which the defendant was aware is not limited to the defendant's own testimony.

State v. Pence, 150 Wis. 2d 759, 767, 442 N.W.2d 540 (Ct. App. 1989).

Specific acts occurring after the charged offense may be admissible under Wis. Stat. § 904.05(2) if the balancing test of Wis. Stat. § 904.03 is met.

State v. Shaw, 124 Wis. 2d 363, 369, 369 N.W.2d 772 (Ct. App. 1985).

Reliance on Wis. Stat. § 904.05(2) for admission of testimony concerning a witness's prior perjury was error when the witness was not charged nor was his character an essential element of a claim or defense.

State v. Boykins, 119 Wis. 2d 272, 278, 350 N.W.2d 710 (Ct. App. 1984).

Exclusion on the ground of remoteness of specific acts of the victim's prior violent conduct within one year of the alleged attempted murder was an erroneous exercise of discretion, when the defendant claimed self-defense.

904.06 Habit; routine practice.

(1) ADMISSIBILITY. Except as provided in s. 972.11(2), evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(2) METHOD OF PROOF. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

Judicial Council Committee's Note (1974)

Sub. (1). This subsection is modeled from Uniform Rule 49 but substitutes the designation "routine practice" for "custom" and also disclaims the need for corroboration of practice as a condition precedent to admission. Apparently the latter is a change in Wisconsin law, *Olson v. Sentry Ins. Co.*, 38 Wis. 2d 175, 156 N.W.2d 429 (1968); *Frank v. Metropolitan Life Ins. Co.*, 227 Wis. 613, 277 N.W. 643 (1938); *Scaramelli & Co. Inc. v. Courteen Seed Co.*, 194 Wis. 520, 217 N.W. 298 (1928); *Federal Asbestos Co. v. Zimmermann*, 171 Wis. 594, 177 N.W. 881 (1920), although it is difficult to ascertain from the cases whether the admissibility or sufficiency of the evidence is being considered, or whether corroboration or the need for establishing the habit or routine practice by specific instances [see Sub. (2)] is being considered. Habit or routine practice evidence is admissible in Wisconsin, *Marolla v. American Family Mut. Ins. Co.*, 38 Wis. 2d 539, 157 N.W.2d 674 (1968); *Karp v. Coolview of Wisconsin, Inc.*, 25 Wis. 2d 299, 130 N.W.2d 790 (1964) [Uniform rules 49 and 50 were cited]; *Bower v. Chicago, M. & St. P. Ry.*, 61 Wis. 457, 21 N.W. 536 (1884); *Lill's Chicago Brewery Co. v. Russell et al.*, 22 Wis. 178 (1867); *Aetna Ins. Co. v. Northwestern Iron Co.*, 21 Wis. 458 (1867).

It should be emphasized that this method of proof is probably the basic method of authenticating and providing the necessary foundation testimony for a data compilation, that it is admissible under chapters 908, 909 or 910.

Sub. (2). See cases cited in the Judicial Council Committee's Note to Sub. (1).

Case Annotations

(1) Admissibility

Balz v. Heritage Mut. Ins. Co., 2006 WI App 131, ¶¶ 13–18, 294 Wis. 2d 700, 720 N.W.2d 704.

Admissible habit evidence is distinguishable from inadmissible character evidence in that habit is a regular repeated response to a repeated, specific situation, whereas character is a generalized description of a party's nature. Evidence that a party engaged in the practice of creating records to falsely reflect that he was conducting business of his employer was not evidence of habit when it did not form any predictable pattern and would not show that the party was actually engaging in personal business on the day in question. Rather, such evidence simply addresses the party's propensity for dishonesty.

Steinberg v. Arcilla, 194 Wis. 2d 759, 770, 535 N.W.2d 444 (Ct. App. 1995).

The defendant anesthesiologist's testimony as to his normal practice for positioning the arms of patients, which the defendant estimated he did 65–70 times per month, was admissible as habit evidence to help prove that he followed this practice when he positioned the plaintiff's arm.

State v. Dwyer, 143 Wis. 2d 448, 465, 422 N.W.2d 121 (Ct. App. 1988), *aff'd*, 149 Wis. 2d 850, 440 N.W.2d 344 (1989).

A third party's testimony that the same officers that questioned the defendant had questioned the third party on a different matter six months before and had told him that unless he made a statement he would be arrested and jailed, fell short of establishing a habit of routine practice permitting the jury to conclude the same representations were made during the defendant's interrogation. As such, the evidence was inadmissible.

Authors' Note. Although the court used the term "habit" in its opinion, this was not really a "habit" case. The issues should be approached through a general relevance analysis to see whether the specific prior occurrences are sufficiently relevant to justify their admissibility. See *Farrell v. John Deere Co.*, 151 Wis. 2d 45, 443 N.W.2d 50 (Ct. App. 1989), under the discussion of Wis. Stat. § 904.03, *supra*, and *Netzel v. State Sand & Gravel Co.*, 51 Wis. 2d 1, 186 N.W.2d 258 (1971).

Lobermeier v. General Tel. Co., 119 Wis. 2d 129, 151, 349 N.W.2d 466 (1984).

Evidence of 10 prior incidents involving personal injuries as a result of improperly grounded telephones was admissible under Wis. Stat. § 904.06 to prove that the practice was routine and as such was highly probative regarding both negligence and cause.

Hart v. State, 75 Wis. 2d 371, 392 n.9, 249 N.W.2d 810 (1977).

There can be no habit of due care or lack thereof. When dealing with prior actions of the defendant while driving, character, not habit, is at issue. Habit is a regular response to a repeated specific situation.

(2) Method of Proof

Lorbiecki v. Pabst Brewing Co., 2024 WI App 33, ¶¶ 40–46, 412 Wis. 2d 641, 8 N.W.3d 821 (petition for review filed).

Evidence of three other mesothelioma occurrences at the defendant's facility with sufficient similarity to the claims being litigated was relevant to show the presence of disturbed asbestos and to show routine practices at the facility.

American Fam. Mut. Ins. Co. v. Golke, 2009 WI 81, ¶¶ 47–48, 319 Wis. 2d 397, 768 N.W.2d 729.

Testimony from an insurance adjuster that he wrote a letter and placed it in his cubicle's mailbox for outgoing mail, that an assistant was responsible for putting the letter in an envelope and placing postage on it, and that another employee would pick up the adjuster's correspondence and give it to a mail-delivery service for transport to the post office was appropriate evidence of routine business practice.

Chomicki v. Wittekind, 128 Wis. 2d 188, 196, 381 N.W.2d 561 (Ct. App. 1985).

Wis. Stat. § 904.06(2) does not require a minimum number of "specific instances of conduct" to establish a routine practice or habit. The key is not how many incidents are testified to, but how relevant and probative they are to the case at bar.

Chapter 10
Other Grounds for Exclusion

904.07 Subsequent remedial measures.

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment or proving a violation of s. 101.11.

Judicial Council Committee's Note (1974)

Post-accident remedial measures as an admission of negligence of culpable conduct are not admissible in Wisconsin, *Raim v. Ventura*, 16 Wis. 2d 67, 113 N.W.2d 827 (1962); *Heiden v. City of Milwaukee*, 226 Wis. 92, 275 N.W. 922, 114 A.L.R. 420 (1937); *Odegard v. North Wisconsin Lumber Co.*, 130 Wis. 659, 110 N.W. 809 (1907); *Kreider v. Wisconsin River Paper & Pulp Co.*, 110 Wis. 645, 86 N.W. 662 (1901); *Green v. Ashland Water Co.*, 101 Wis. 258, 77 N.W. 722, 43 L.R.A. 117, 70 Am. St. Rep. 911 (1898); *Anderson v. Chicago, St. P., M. & O. R.R.*, 87 Wis. 195, 58 N.W. 79, 23 L.R.A. 203 (1894); *Lang v. Sanger*, 76 Wis. 71, 44 N.W. 1095 (1890); *Castello v. Landwehr*, 28 Wis. 522 (1871). The exception that permits offer for another controverted purpose such as ownership, control, or feasibility of precautionary measures if controverted, *L.M. Bickett Co. v. Industrial Comm'n*,

10 Wis. 2d 289, 102 N.W.2d 748 (1960); *Hipke v. Industrial Comm'n*, 261 Wis. 226, 52 N.W.2d 401 (1952); *Sweitzer v. Fox*, 226 Wis. 26, 275 N.W. 546 (1937); *Fonder v. General Const. Co.*, 146 Wis. 1, 130 N.W. 884 (1911); or impeachment, (Wigmore, s. 283 (Supp. 1970) and *Jennings v. Town of Albion*, 90 Wis. 22, 62 N.W. 926 (1895), where principle was identified but not decided) seem consistent with Wisconsin case law, although no Wisconsin case has been found where evidence of subsequent repairs has been utilized to evidence questions of ownership or control that occur most frequently in safe-place cases. The rule does not attempt to make the determination whether remedial measures in product design are admissible as "feasibility of a precautionary measure" to prove that the product was defective. The authorities are in conflict. See *1 MB Products Liability*, s. 12.04, at 337 (1964).

Evidence of subsequent remedial measures is admissible in safe place cases to establish that the premises were not as safe as the nature of the place would reasonably permit. *Raim v. Ventura*, 16 Wis. 2d 67, 113 N.W.2d 827 (1962); *Zehren v. F.W. Woolworth Co.*, 11 Wis. 2d 539, 105 N.W.2d 563 (1960); *Heiden v. City of Milwaukee*, 226 Wis. 92, 275 N.W. 922, 114 A.L.R. 420 (1937); *Sweitzer v. Fox*, 226 Wis. 26, 275 N.W. 546 (1937).

Case Annotations

Vanderventer v. Hyundai Motor Am., 2022 WI App 56, ¶¶ 93–110, 405 Wis. 2d 481, 983 N.W.2d 1 (review denied).

This was a products-liability case alleging enhanced injuries as a result of a defective driver's seat. The court of appeals affirmed the trial court's discretionary determination allowing evidence of a different seat design under the impeachment exception to the rule prohibiting the use of a subsequent remedial measure to prove negligence. The record demonstrated several points for which evidence of the different design later incorporated into the manufacturer's vehicles could impeach specific testimony that the design used was state of the art and the best available.

> ***Authors' Note.*** In a strict-products-liability case, Wis. Stat. § 895.047(4) also applies to prohibit evidence of subsequent remedial measures for the purpose of showing a design defect. In *Vanderventer*, the court held the evidence of a different design did not violate the statute. Wis. Stat. § 895.047(1)(a) required the plaintiff to show that a reasonable alternative seat design existed when the car was sold. The different seat design tended to show that a reasonable alternative could have been adopted because it was similar to another design that the manufacturer had used before the sale of the car.

Heuser v. Community Ins. Corp., 2009 WI App 151, ¶¶ 13–15, 321 Wis. 2d 729, 774 N.W.2d 653.

Student-injury report forms prepared by a teacher describing the injuries and suggesting methods to prevent future similar injuries were not inadmissible under

Wis. Stat. § 904.07. The report forms themselves were not "measures taken." They were, at most, suggestions for remedial precautions. Only evidence of actual remedial measures is precluded by this section.

Ansani v. Cascade Mountain, Inc., 223 Wis. 2d 39, 55–57, 588 N.W.2d 321 (Ct. App. 1998).

Trial courts must restrict the impeachment exception under Wis. Stat. § 904.07 to ensure that the thrust of the questioning is used for impeachment and not to prove negligence.

In this negligence action by an injured skier against a ski resort operator and its insurer, the trial court properly permitted testimony about subsequent remedial measures for the purpose of impeaching several of the defendants' witnesses. These witnesses had testified that a fixed object at the end of a ski run, which the plaintiff struck and was injured by, "always" had a protective fence up around it, although most of the witnesses testified that they could not specifically recall the fence being in place on the date of the accident.

Huss v. Yale Materials Handling Corp., 196 Wis. 2d 515, 526–29, 538 N.W.2d 630 (Ct. App. 1995).

Subsequent remedial measures, with some exceptions, are not available to prove claims of negligence against a manufacturer. However, such evidence may be admissible to prove allegations of strict liability. When both negligence and strict liability are alleged, it is up to the trial court to exercise its discretion in determining whether to allow the evidence of the subsequent remedial measure. A trial court may properly determine that such evidence be excluded if it will unfairly prejudice the manufacturer and confuse the jury. If the evidence of subsequent remedial measures is allowed, the manufacturer is entitled to a limiting instruction directing the jury to consider the evidence only as to the strict liability claim.

Whether postmanufacture industry custom is admissible to prove negligence in a products-liability suit is not governed by Wis. Stat. § 904.07 or any other specific evidentiary rule.

Ollhoff v. Peck, 177 Wis. 2d 719, 725–26, 503 N.W.2d 323 (Ct. App. 1993).

Even if a subsequent remedial act is admissible to prove a safe-place violation or is sought to be used to impeach testimony, it still may be excluded under Wis. Stat. § 904.03, if its probative value is substantially outweighed by the danger of unfair prejudice or other factors. Therefore, in a personal-injury case, the court properly excluded evidence of the placement of a warning sign at a pond the day after the plaintiff had reached into the pond to pet a musky and was bitten.

Wheeler v. General Tire & Rubber Co., 142 Wis. 2d 798, 815, 419 N.W.2d 331 (Ct. App. 1987).

While evidence of post-accident warnings by a defendant manufacturer is inadmissible in a duty-to-warn case, evidence of subsequent remedial measures by third

persons is admissible.

D.L. v. Huebner, 110 Wis. 2d 581, 600–08, 329 N.W.2d 890 (1983).

The rule of exclusion in Wis. Stat. § 904.07 is narrow. The list of exceptions in this section is illustrative, not exclusive.

Courts must exercise great care in admitting evidence under the impeachment exception of this rule to prevent that exception from destroying the rule. The trial court should carefully exercise its discretion to exclude evidence admissible under the impeachment exception when the evidence "proves negligence under the guise of impeachment." The adequacy of a limiting instruction regarding the use of evidence is a factor that the trial court may take into account in exercising its discretion as to whether to admit this type of evidence.

The rule excluding post-event evidence rests on two weak premises, neither of which is sufficient to support the rule alone. The first is relevance, i.e., subsequent repairs do not necessarily imply that the actor acknowledges prior negligence. The second is public policy, i.e., admission of such evidence would discourage persons from making repairs after an accident. Even though the court acknowledged the validity of the criticism of the rule, it nonetheless declined to eliminate it.

> ***Authors' Note.*** The *Huebner* court referred to "event" in this section as the date of manufacture, although the word "event" seems more likely to refer to the date of injury.

Krueger v. Tappan Co., 104 Wis. 2d 199, 208, 311 N.W.2d 219 (Ct. App. 1981).

In a products-liability case involving the duty to warn, the conduct of the manufacturer is emphasized rather than the character of the product. Accordingly, this rule prevents the use of subsequent remedial measures to prove that the conduct of the manufacturer in failing to give adequate warning was culpable in the first instance.

Chart v. General Motors Corp., 80 Wis. 2d 91, 100–01, 258 N.W.2d 680 (1977).

In products-liability cases, the emphasis has shifted from the manufacturer's conduct to the character of the product. Therefore, evidence of subsequent remedial measures will be admissible in a case in which the issue is improper product design.

904.08 Compromise and offers to compromise.

Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, proving accord and satisfaction, novation or release, or proving an effort to compromise or obstruct a criminal investigation or prosecution.

Judicial Council Note (1993)

Subsection (2) is repealed as surplusage. Liability and damages are rarely at issue in custody and placement disputes; when they are, the rule applies nonetheless.

Judicial Council Committee's Note (1974)

The exclusion of evidence of a compromise or offers to compromise or settlement negotiations when offered to prove liability for, or invalidity of, the claim or its amount is consistent with Wisconsin cases. *State Medical Soc. v. Associated Hosp. Serv., Inc.*, 23 Wis. 2d 482, 128 N.W.2d 43 (1964); *Connor v. Michigan Wisconsin Pipe Line Co.*, 15 Wis. 2d 614, 113 N.W.2d 121 (1962). The second sentence withdraws from the foregoing cases the proviso that "admissions of independent facts occurring during negotiations" are admissible. Those cases acknowledge the difficulty of establishing the distinction and admonish trial courts to be cautious in determining admissibility. The grey area is now excluded except for the limited purposes described in the third sentence. The alteration to the third sentence of the Federal Rule is made to assure that *Elmer v. Chicago & N.W. Ry.*, 260 Wis. 567, 51 N.W.2d 707 (1952), and *Collins v. State*, 115 Wis. 596, 92 N.W. 266 (1902), are unaffected by the rule and that offers other than to the court or to the prosecuting attorney (s. 904.10) to settle a criminal prosecution remain admissible; and to assure admissibility of evidence relative to compromise negotiations where it is contended that accord and satisfaction, novation or release has resulted.

Case Annotations

Allsop Venture Partners III v. Murphy Desmond SC, 2023 WI 43, ¶¶ 23–30, 407 Wis. 2d 387, 991 N.W.2d 320.

The trial court properly exercised its discretion to allow evidence that the plaintiffs reached a pretrial settlement with two central tortfeasors. Because of the settlement, the posture of the plaintiffs' arguments changed significantly, and some of the plaintiffs' witnesses (including the plaintiffs themselves) might have become biased against the remaining tortfeasor because the plaintiffs' incentives at trial changed. The trial court did not rule that the settlement amount was admissible (although the plaintiffs chose to elicit it) and gave a cautionary instruction to the jury that settlement evidence was to be used for credibility purposes, not as proof of fault or damages.

Morden v. Continental AG, 2000 WI 51, ¶¶ 80–86, 235 Wis. 2d 325, 611 N.W.2d 659.

Evidence of the plaintiffs' covenant not to sue a vehicle manufacturer was inadmissible in an action against a tire manufacturer for the purpose of establishing bias on the part of the plaintiffs' accident reconstruction expert. Although the expert did not testify at trial about crashworthiness of the vehicle, as he had in a pretrial deposition, no crashworthiness questions were asked of him at trial. Accordingly, there was no showing of witness bias by a change in testimony. Wis. Stat. § 904.08 should not be read more expansively to include the admission of settlement evidence for purposes other than those enumerated in the statute.

Ruediger v. Sheedy (In re Est. of Ruediger), 83 Wis. 2d 109, 125–27, 264 N.W.2d 604 (1978).

The rule prohibiting admission of an unaccepted offer of compromise creates a privilege based on the public policy of encouraging settlements.

Offers of compromise can, however, be offered to prove independent facts other than the compromise or the negotiation surrounding it, if they are admitted for one of the limited purposes described in the third sentence of Wis. Stat. § 904.08.

Johnson v. Heintz, 73 Wis. 2d 286, 300, 243 N.W.2d 815 (1976).

It was proper for the trial court to refuse to permit details regarding the amount of the settlement. However, the fact of the settlement and the alignment of the parties and their insurance companies were admissible.

See also ....

Hareng v. Blanke, 90 Wis. 2d 158, 168, 279 N.W.2d 437 (1979) (evidence of settlement admissible to show witness's bias)

904.085 Communications in mediation.

(1) PURPOSE. The purpose of this section is to encourage the candor and cooperation of disputing parties, to the end that disputes may be quickly, fairly and voluntarily settled.

(2) DEFINITIONS. In this section:

(a) "Mediation" means mediation under s. 93.50(3), conciliation under s. 111.54, mediation under s. 111.11, 111.70(4)(cg) or (cm)3. or 111.87, mediation under s. 115.797, negotiation under s. 289.33(9), mediation under ch. 655 or s. 767.405, or any similar statutory, contractual or court-referred process facilitating the voluntary resolution of disputes. "Mediation" does not include binding arbitration or appraisal.

(b) "Mediator" means the neutral facilitator in mediation, its agents and employees.

(c) "Party" means a participant in mediation, personally or by an attorney, guardian, guardian ad litem or other representative, regardless of whether such person is a party to an action or proceeding whose resolution is attempted through mediation.

(3) INADMISSIBILITY.

(a) Except as provided under sub. (4), no oral or written communication relating to a dispute in mediation made or presented in mediation by the mediator or a party is admissible in evidence or subject to discovery or compulsory process in any judicial or administrative proceeding. Any communication that is not admissible in evidence or not subject to discovery or compulsory process under this paragraph is not a public record under subch. II of ch. 19.

(b) Except as provided under sub. (4), no mediator may be subpoenaed or otherwise compelled to disclose any oral or written communication relating to a dispute in mediation made or presented in mediation by the mediator or a party or to render an opinion about the parties, the dispute whose resolution is attempted by mediation or any other aspect of the mediation.

(4) EXCEPTIONS.

(a) Subsection (3) does not apply to any written agreement, stipulation or settlement made between 2 or more parties during or pursuant to mediation.

(b) Subsection (3) does not apply if the parties stipulate that the mediator may investigate the parties under s. 767.405(14)(c).

(c) Subsection (3)(a) does not prohibit the admission of evidence otherwise discovered, although the evidence was presented in the course of mediation.

(d) A mediator reporting child or unborn child abuse under s. 48.981, reporting a threat of violence in or targeted at a school under s. 175.32, or reporting nonidentifying information for statistical, research or educational purposes does not violate this section.

(e) In an action or proceeding distinct from the dispute whose settlement is attempted through mediation, the court may admit evidence otherwise barred by this section if, after an *in camera* hearing, it determines that admission is necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally.

Judicial Council Note (1993)

This section creates a rule of inadmissibility for communications presented in mediation. This rule can be waived by stipulation of the parties only in narrow circumstances [see sub. (4)(b)] because the possibility of being called as a witness impairs the mediator in the performance of the neutral facilitation role. The purpose of the rule is to encourage the parties to explore facilitated settlement of disputes without fear that their claims or defenses will be compromised if mediation fails and the dispute is later litigated.

Case Annotations

Dyer v. Blackhawk Leather LLC, 2008 WI App 128, ¶¶ 12–17, 313 Wis. 2d 803, 758 N.W.2d 167.

Wis. Stat. § 904.085 creates a privilege rendering inadmissible in evidence any oral or written communication made or presented in mediation that is not otherwise discovered. The privilege may be applied when the communication is sought to be introduced or discovered.

The phrase "otherwise discovered" in Wis. Stat. § 904.085(4)(c) means "discovered outside of mediation," not "discovered outside the bounds of formal civil discovery." The rule is intended to prevent a party from making preexisting, unprivileged information privileged, simply by communicating it in the course of mediation.

Wis. Stat. § 904.085(4)(e), the catchall exception, states only that a court may admit such evidence. It does not, on its face, create an exception to the rule against discovery.

Zellner v. Cedarburg Sch. Dist., 2007 WI 53, ¶ 48, 300 Wis. 2d 290, 731 N.W.2d 240.

A memorandum and a compact disc (CD) compiled in conjunction with a meeting between a school district and an employee that was closed pursuant to Wis. Stat. § 19.85(1)(b) were not, despite the meeting being closed, exempt from disclosure under Wis. Stat. § 904.085(3) because the items were not created for the purpose of mediation.

904.09 Payment of medical and similar expenses.

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Judicial Council Committee's Note (1974)

Note that this section has not the breadth of application of s. 904.08 and is a special application of the rule. In practice this subject has been handled as an offer to compromise or as a humanitarian action protected for reasons of extrinsic policy. The developing practice of "advance" medical and hospital expense payments by insurance companies should be encouraged.

"Furthermore, sound public policy requires that the voluntary payment of medical expenses or other benefits by a self-insured employer, or by the insurance carrier of an insured employer, to an alleged employee who has sustained an injury, should never constitute an admission of liability to the detriment of such payor. Such payments are often made as the result of humane impulse on the part of the employer and such a policy should be encouraged rather than discouraged." *Scholz v. Industrial Comm'n*, 267 Wis. 31, 40, 64 N.W.2d 204, 209 (1954), *rehearing denied* 267 Wis. 31, 65 N.W.2d 1 (1954).

904.10 Offer to plead guilty; no contest; withdrawn plea of guilty.

Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to the court or prosecuting attorney to plead guilty or no contest to the crime charged or any other crime, or in civil forfeiture actions, is not admissible in any civil or criminal proceeding against the person who made the plea or offer or one liable for the person's conduct. Evidence of statements made in court or to the prosecuting attorney in connection with any of the foregoing pleas or offers is not admissible.

Judicial Council Committee's Note (1974)

The admissibility of a withdrawn guilty plea or offer to plead guilty in a subsequent civil or criminal proceeding apparently has not been decided in Wisconsin. The latest cases develop the weight of authority in favor of exclusion. Annot., 86 A.L.R.2d 326 (1962); *Wigmore*, 1067. *Lee v. Board of Dental Examiners*, 29 Wis. 2d 330, 334, 139 N.W.2d 61, 63 (1966), is consistent with this rule in excluding a no contest plea from receipt as an admission in a subsequent or collateral civil action. Section 904.10 supplements that view by excluding the no contest plea in all civil or criminal proceedings. This section contains four changes from the comparable federal rule: (1) "Nolo contendere" is changed to no contest to agree with Wisconsin nomenclature; (2) The rule is applied to civil forfeiture actions; (3) The application of the rule is narrowed to apply only to in-court proceedings or offers to the court to plead guilty. Out-of-court statements other than those that are offers to the court or to the prosecuting attorney are admissible in evidence and not within the proscription of this section. The change is consistent with the last sentence of s. 904.08 as herein proposed. The effect of a statute that provides that forfeiture of deposit by nonappearance is equivalent to a stipulated no contest plea is construed to be an offer addressed to the court and within the proscription of this section (s. 345.26(1)(b)); and (4) The exclusionary effect of the rule is expanded to apply to one liable for the conduct of the person who made the withdrawn plea or offer, e.g., insurance company, driver's license sponsor, employer.

Authors' Note. *See also* Wis. Stat. § 345.38 (providing that forfeiture of deposit shall not be admissible in evidence as statement against interest in any action or proceeding arising out of same occurrence).

Case Annotations

State v. Myrick, 2013 WI App 123, ¶¶ 9–10, 351 Wis. 2d 32, 839 N.W.2d 129, *aff'd*, 2014 WI 55, ¶¶ 32–42, 354 Wis. 2d 828, 848 N.W.2d 743.

The defendant's testimony at a preliminary examination of a coparticipant in the crime was offered in connection with the plea-bargain process and therefore was inadmissible in a later criminal proceeding against the defendant. The court determined the testimony was made in connection with a plea bargain because the deal was ongoing and still in flux when the defendant testified at the preliminary examination. For instance, the parties still could have bargained over sentencing recommendations or the proposed charge. The fact that the defendant refused to cooperate with the state after the preliminary examination did not make his previous testimony admissible.

State v. Norwood, 2005 WI App 218, ¶¶ 20–21, 287 Wis. 2d 679, 706 N.W.2d 683.

A criminal defendant's letter to the court in which he expressed his desire not to go through with trial and requested a sentence from the court was inadmissible under Wis. Stat. § 904.10 as a plea offer. Wis. Stat. § 904.10 trumps Wis. Stat. § 908.01(4)(b) because it excludes only a particular category of party admissions and is therefore more specific.

Kustelski v. Taylor, 2003 WI App 194, 18–19, 266 Wis. 2d 940, 669 N.W.2d 780.

After being involved in a vehicle collision, a driver pleaded no contest to a charge of endangering safety by use of a dangerous weapon and then brought a negligence suit against the other driver. The court of appeals held that the trial court erred by dismissing the negligence claim based on the trial court's misunderstanding that "even a no contest can be used … in a civil case once there is a finding of guilt"; under Wis. Stat. § 904.10, a no-contest plea cannot be used collaterally in civil litigation.

State v. Pischke, 198 Wis. 2d 257, 266–68, 542 N.W.2d 202 (Ct. App. 1995).

Statements made to a police officer, as opposed to a district attorney, in an effort to foster settlement of a criminal case were not offers to plead guilty within the meaning of Wis. Stat. § 904.10, and were properly admitted at trial. Certain statements taken in isolation could reasonably be construed as directed to the district attorney, but the overwhelming tone of the letter admitted at trial was that the defendant wanted the police officer's help.

State v. Nicholson, 187 Wis. 2d 688, 697–98, 523 N.W.2d 573 (Ct. App. 1994).

To determine whether a statement is made within the context of plea negotiations and is therefore barred by Wis. Stat. § 904.10 or is made during confession negotiations and is therefore admissible, a two-tiered analysis is required: (1) the court must determine whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and (2) the court must evaluate whether the accused's expectation was reasonable given the totality of the objective circumstances.

State v. Nash, 123 Wis. 2d 154, 159–60, 366 N.W.2d 146 (Ct. App. 1985).

Wis. Stat. § 904.10 does not preclude the testimony of a defendant given in other trials, pursuant to a plea agreement that is later withdrawn. The rationale behind the rule is inapplicable when the testimony is at the trial and not a part of the plea hearing, and when it is given after the negotiations have been completed.

State v. Gustafson, 119 Wis. 2d 676, 686, 350 N.W.2d 653 (1984), *modified on other grounds on reh'g*, 121 Wis. 2d 459, 359 N.W.2d 920 (1985).

Evidence of a juvenile adjudication or evidence of a no-contest plea in a juvenile matter is not admissible even if the juvenile is merely a witness. A plea of no contest is not an admission.

Gedlen v. Safran (In re Est. of Safran), 102 Wis. 2d 79, 94–95, 306 N.W.2d 27 (1981).

A criminal conviction, whether based on a plea of no contest or on a verdict of guilty, is generally not admissible in a subsequent civil action.

Wis. Stat. § 904.10 supplements the general rule that a criminal conviction is inadmissible by additionally excluding evidence of a plea that implied a concession of guilt.

See also ....

State v. Crowell, 149 Wis. 2d 859, 872, 440 N.W.2d 352 (1989) (error to admit probation officer's testimony about defendant's statements during presentence investigation if there is a later withdrawn guilty plea)

State v. Mason, 132 Wis. 2d 427, 393 N.W.2d 102 (Ct. App. 1986) (contradictory statements made during plea hearing not admissible at trial to impeach defendant)

904.11 Liability insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This section does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Judicial Council Committee's Note (1974)

The section is consistent with Wisconsin cases. *Fleischman v. Holz*, 23 Wis. 2d 415, 127 N.W.2d 9 (1964); *Filipiak v. Plombon*, 15 Wis. 2d 484, 113 N.W.2d 365 (1962); *Vuchetich v. General Casualty Co.*, 270 Wis. 552, 72 N.W.2d 389 (1955); *Doepke v. Reimer*, 217 Wis. 49, 258 N.W. 345 (1935); *Pawlowski v. Eskofski*, 209 Wis. 189, 244 N.W. 611 (1932); *Walker v. Pomush*, 206 Wis. 45, 238 N.W. 859 (1931); *Grandhagen v. Grandhagen*, 199 Wis. 315, 225 N.W. 935 (1929); *Martell v. Kutcher*, 195 Wis. 19, 216 N.W. 522 (1928); *Kellner v. Christiansen*, 169 Wis. 390, 172 N.W. 796 (1919). Note that this rule refers to excluding evidence of insurance to prove negligent or wrongful conduct. It will not preclude disclosure of insurance where ss. 204.30(4) and 260.11(1) are applicable and an insurance company is a party.

Case Annotations

City of West Allis v. Wisconsin Elec. Power Co., 2001 WI App 226, ¶¶ 48–49, 248 Wis. 2d 10, 635 N.W.2d 873.

The rationale for excluding evidence of liability insurance to show fault applies to punitive, as well as compensatory, damages. Although a jury is permitted to receive evidence of a defendant's wealth when assessing punitive damages, insurance coverage is not evidence of wealth.

Stoppleworth v. Refuse Hideaway, Inc., 200 Wis. 2d 512, 523–25, 546 N.W.2d 870 (1996).

In a jury trial, as a procedural rule, the court should apprise the jury of the names of all parties to the lawsuit, including an insurance company. The name of any given joined party is not evidence, and Wis. Stat. § 904.11 does not preclude reference to an insurance company in this context.

Estate of Burgess v. Peterson, 196 Wis. 2d 55, 71, 537 N.W.2d 115 (Ct. App. 1995).

In a negligence action against the personal representative of an estate, evidence that the personal representative was bonded is analogous to evidence that a person is insured and, like evidence about insurance, is not admissible on the issue of negligence.

Chapter 11

Statements by Injured Person; Information Concerning Crime Victims; Inadmissibility of Statement by Health Care Provider of Apology or Condolence; Communication in Farmer Assistance Programs; and Health Care Reports

904.12 Statement of injured; admissibility; copies.

(1) In actions for damages caused by personal injury, no statement made or writing signed by the injured person within 72 hours of the time the injury happened or accident occurred, shall be received in evidence unless such evidence would be admissible as a present sense impression, excited utterance or a statement of then existing mental, emotional or physical condition as described in s. 908.03(1), (2) or (3).

(2) Every person who takes a written statement from any injured person or person sustaining damage with respect to any accident or with respect to any injury to person or property, shall, at the time of taking such statement, furnish to the person making such statement, a true, correct and complete copy thereof. Any person taking or having possession of any written statement or a copy of said statement, by any injured person, or by any person claiming damage to property with respect to any accident or with respect to any injury to person or property, shall, at the request of the person who made such statement or the person's personal representative, furnish the person who made such statement or the person's personal representative, a true, honest and complete copy thereof within 20 days after written demand. No written statement by any injured person or any person sustaining damage to property shall be admissible in evidence or otherwise used or referred to in any way or manner whatsoever in any civil action relating to the subject

matter thereof, if it is made to appear that a person having possession of such statement refused, upon the request of the person who made the statement or the person's personal representatives, to furnish such true, correct and complete copy thereof as herein required.

(3) This section does not apply to any statement taken by any officer having the power to make arrests.

Judicial Council Committee's Note (1974)

This rule formerly was s. 885.28, which has been interpreted in *Schueler v. City of Madison*, 49 Wis. 2d 695, 707, 183 N.W.2d 116, 123 (1971). The term "res gestae" has been deleted to conform with the modern terminology of these rules. This rule recognizes that admissions are not hearsay but draws on the enumerated hearsay exceptions to describe the kinds of admissions that are not subject to the 72-hour rule.

Subsection (3) is created to make sure that the reader understands that neither subsection (1) nor subsection (2) applies to any statement taken by any officer having the power to make arrests as was originally decided by case law in connection with subsection (1) as well as by the legislature in later enacting subsection (2).

Case Annotations

Hart v. Artisan & Truckers Cas. Co., 2017 WI App 45, ¶ 2, 377 Wis. 2d 177, 900 N.W.2d 610.
Wis. Stat. § 904.12(1) does not bar the admission into evidence of an injured person's release of claims signed within 72 hours after an accident.

904.13 Information concerning crime victims.

(1) In this section:

(a) "Crime" has the meaning described in s. 950.02(1m).

(b) "Family member" has the meaning described in s. 950.02(3).

(c) "Victim" has the meaning described in s. 950.02(4).

(2) In any action or proceeding under ch. 938 or chs. 967 to 979, evidence of the address of an alleged crime victim or any family member of an alleged crime victim or evidence of the name and address of any place of employment of an alleged crime victim or any family member of an alleged crime victim is relevant only if it meets the criteria under s. 904.01. District attorneys shall make appropriate objections if they believe that evidence of this information, which is being elicited by any party, is not relevant in the action or proceeding.

904.14 Inadmissibility of statement by health care provider of apology or condolence.

(1) In this section:

(a) "Health care provider" has the meaning given in s. 146.81(1) and includes an ambulatory surgery center, an adult family home as defined in s. 50.01 (1), and a residential care apartment complex, as defined in s. 50.01 (6d), that is certified or registered by the department of health services.

(b) "Relative" has the meaning given in s. 106.50(1m)(q).

(2) A statement, a gesture, or the conduct of a health care provider, or a health care provider's employee or agent, that satisfies all of the following is not admissible into evidence in any civil action, administrative hearing, disciplinary proceeding, mediation, or arbitration regarding the health care provider as evidence of liability or as an admission against interest:

(a) The statement, gesture, or conduct is made or occurs before the commencement of the civil action, administrative hearing, disciplinary proceeding, mediation, or arbitration.

(b) The statement, gesture, or conduct expresses apology, benevolence, compassion, condolence, fault, liability, remorse, responsibility, or sympathy to a patient or his or her relative or representative.

Note. *Cf.* Wis. Stat. § 904.085 (communications in mediation).

904.15 Communication in farmer assistance programs.

(1) Except as provided under sub. (2), no oral or written communication made in the course of providing or receiving advice or counseling under s. 93.51 or in providing or receiving assistance under s. 93.41 or 93.52 is admissible in evidence or subject to discovery or compulsory process in any judicial or administrative proceeding.

(2) (a) Subsection (1) does not apply to information relating to possible criminal conduct.

(b) Subsection (1) does not apply if the person receiving advice or counseling under s. 93.51 or assistance under s. 93.41 or 93.52 consents to admission or discovery of the communication.

(c) A court may admit evidence otherwise barred by this section if necessary to prevent a manifest injustice.

904.16 Health care reports.

(1) In this section:

(a) "Health care provider" has the meaning given in s. 146.38(1)(b).

(b) "Regulatory agency" means the department of safety and professional services or the division within the department of health services that conducts quality assurance activities related to health care providers.

(2) Except as provided in sub. (3), the following may not be used as evidence in a civil or criminal action brought against a health care provider:

(a) Reports that a regulatory agency requires a health care provider to give or disclose to that regulatory agency.

(b) Statements of, or records of interviews with, employees of a health care provider related to the regulation of the health care provider obtained by a regulatory agency.

(3) This section does not prohibit the use of the reports, statements, and records described in sub. (2) in any administrative proceeding conducted by a regulatory agency. This section does not apply to reports protected under s. 146.997.

Chapter 12
General Rule

905.01 Privileges recognized only as provided.

Except as provided by or inherent or implicit in statute or in rules adopted by the supreme court or required by the constitution of the United States or Wisconsin, no person has a privilege to:

(1) Refuse to be a witness; or

(2) Refuse to disclose any matter; or

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

Judicial Council Committee's Note (1974)

The introductory part of this section has been redrafted to apply to Wisconsin; the four subsections remain the same as the Federal Rule. Constitutional provisions which relate to admissions or exclusions of evidence are not included in this chapter nor are they affected by this section.

The phrase "or inherent or implicit in statute" is designed to insure that the "work product" immunity rule and the interpretations of s. 19.21 are unaffected. *State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis. 2d 559, 150 N.W.2d 387, 35 A.L.R.3d 377 (1967); *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 137 N.W.2d 470, *modified and rehearing denied* 28 Wis. 2d 672, 139 N.W.2d 241 (1965); *Beckon v. Emery*, 36 Wis. 2d 510, 153 N.W.2d 501 (1967). The Wisconsin "work product" immunity rule like the federal rule originates in the discovery statutes. However, the federal rule has now been incorporated expressly in revised Rule 26(b)(3) of the Federal Rules of Civil Procedure. Wisconsin does not appear to be inconsistent with this manner of restricting privileges. *State v. Driscoll*, 53 Wis. 2d 699, 193 N.W.2d 851 (1972); *State v. Knops*, 49 Wis. 2d 647, 183 N.W.2d 93 (1971). Common law privileges, not originating in the constitution, could not be enlarged on a case by case basis.

This section recognizes that there are other statutory privileges that are not included in this chapter. However, they are provided for in other statutory provisions. Statutory provision regarding fire marshal reports, s. 165.55(8), would not be altered.

The right of a member of the public to inspect public documents as specified in s. 19.21 (formerly s. 18.01) remains subject to the procedure outlined in *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 137 N.W.2d 470, *modified and rehearing denied* 28 Wis. 2d 672, 139 N.W.2d 241 (1965) and *Beckon v. Emery*, 36 Wis. 2d 510, 153 N.W.2d 501 (1967). Public policy favors the production of public records and documents and nonproduction is justified only if the custodian's specific reasons for refusal to inspect establish that the harm done to the public interest by inspection outweighs the right of a member of the public to access. The public's right to inspect public documents remains subject to a judicial determination whether the public interest outweighs the right of a member of the public to have access to a particular document. The privilege provided by s. 905.09 is subject to s. 19.21 and the procedure implementing it by virtue of the phrase in s. 905.09 "to the extent available by law to a person other than the federal government, or state or subdivision thereof."

Authors' Note. *See also* Wis. Stat. §§ 885.205 (grants privilege to deans of students at institutions of higher education as well as to school psychologists), 118.126 (requires, subject to exceptions, psychologists, counselors, social workers, and nurses to keep confidential any information received from student relating to drug usage), 885.14 (titled "Disclosure of information and sources by news person"; creates a limited privilege against the disclosure of confidential news sources through the issuance of a subpoena).

Case Annotations

Sands v. Whitnall Sch. Dist., 2008 WI 89, ¶¶ 23–59, 312 Wis. 2d 1, 754 N.W.2d 439.

Wis. Stat. § 905.01 describes the scope of evidentiary privileges. The statute's phrase *inherent or implicit* is to be narrowly construed, primarily as protection of the work-product privilege. It does not create an implicit evidentiary privilege for governmental meetings held in closed session pursuant to Wis. Stat. § 19.85 of the Open Meetings Law. *Closed meeting* is not synonymous with "a meeting that, by definition, entails a privilege exempting its contents from discovery."

Sliwinski v. Board of Fire & Police Comm'rs, 2006 WI App 27, ¶ 13, 289 Wis. 2d 422, 711 N.W.2d 271.

Privileges are not lightly created or expansively construed, because they are in derogation of the search for truth.

Carney-Hayes v. Northwest Wis. Home Care, Inc., 2005 WI 118, 284 Wis. 2d 56, 699 N.W.2d 524.

An expert's privilege pursuant to Wis. Stat. § 907.06 not to testify as an expert, as explicated in *Glenn v. Plante* and *Burnett v. Alt*, is reaffirmed for medical witnesses in a medical malpractice case. To compel an expert to testify involuntarily, a party must not only show a compelling need for the testimony but must also present a plan of reasonable compensation. The unwilling expert can only be compelled to give existing opinions and cannot be asked to undertake additional opinions. There must be a link between a finding of compelling circumstances and the uniquely necessary or irreplaceable opinion testimony that the expert could provide. Medical witnesses can be asked about their relevant conduct, treatment of the patient, observations, thought processes, training, reasons for actions taken, and applicable institutional rules. However, a medical witness cannot be forced to give opinions regarding standard of care, unless the witness is a party or otherwise accused of malpractice.

Authors' Note. As pointed out by the concurrences/dissents in *Carney-Hayes*, there are now three types of medical witnesses in malpractice cases: (1) the ordinary medical witness; (2) an *Alt* witness who cannot be required to give an opinion as to standard of care applicable to another person; and (3) a *Shurpit* witness, *see Shurpit v. Brah*, 30 Wis. 2d 388, 141 N.W.2d 266 (1966), who can be converted from an *Alt*

witness by being made a party and who can be required to give an opinion as to the standard of care governing that witness's own conduct. In a case in the third category, the trial court might be required to assess the reasonableness of the proposed conversion. *See Carney-Hayes*, 2005 WI 118, ¶¶ 78–80, 284 Wis. 2d 56 (Bradley, A.W., J., concurring in part, dissenting in part).

Custodian of Recs. v. State (In re John Doe Proc.), 2004 WI 65, ¶¶ 11–17, 272 Wis. 2d 208, 680 N.W.2d 792.

Wis. Stat. § 13.96, which requires that all data stored by the Legislative Technology Services Bureau (LTSB) be kept confidential, as it interacts with Wis. Stat. § 905.01, does not create an implicit statutory privilege that would excuse an individual from complying with a John Doe subpoena for electronically stored communications within the possession of the LTSB. Not all confidential data is that over which a custodian or owner may assert a privilege.

Glenn v. Plante, 2004 WI 24, ¶¶ 21–32, 269 Wis. 2d 575, 676 N.W.2d 413.

Wis. Stat. § 907.06 implicitly provides that an expert witness has the privilege to refuse to testify if called by a litigant. While generally there must be a clear invocation of the privilege, if the physician expert in a medical malpractice action was not given an opportunity to formally invoke the privilege, then that physician should not be ordered to give expert testimony. A treating physician may be required to testify regarding the physician's observations relating to the care or treatment given the patient, but may assert the privilege not to testify as to the standard of care and treatment provided by another physician, unless the court determines under *Burnett v. Alt* that there are compelling circumstances. This inquiry from *Burnett v. Alt* focuses on whether unique or irreplaceable opinion testimony is sought from the expert.

Burnett v. Alt, 224 Wis. 2d 72, 84–91, 589 N.W.2d 21 (1999).

A witness has a legal privilege to refuse to provide expert testimony. Absent a showing of compelling circumstances and a plan of reasonable compensation, an expert cannot be compelled to give expert testimony regardless of whether the inquiry asks for the expert's existing opinions or would require further work. Under no circumstances can an expert be required to do additional preparation.

A privilege that existed at common law before the adoption of the rules of evidence is no longer valid, unless it is adopted by the legislature or a supreme court rule or required by the state or federal constitution.

State v. Migliorino, 170 Wis. 2d 576, 588, 489 N.W.2d 678 (Ct. App. 1992).

Testimonial privileges in Wisconsin cannot be created by judicial decision. Common-law testimonial privileges did not survive the enactment of Wis. Stat. § 905.01 unless they were "inherent or implicit" in a constitutional, statutory, or rule provision. A court cannot adopt testimonial privileges on a case-by-case basis.

State ex rel. Green Bay Newspaper Co. v. Circuit Ct., 113 Wis. 2d 411, 420–22, 335 N.W.2d 367 (1983).

A journalist's privilege to not disclose sources can be denied if the criminal defendant can produce evidence that there is a reasonable probability that the subpoenaed witnesses' testimony will be competent, relevant, material, and favorable to the defense, and the defendant has shown the trial court, by a preponderance of the evidence, that the defendant has investigated other sources for the kind of information the defendant seeks and there are no reasonable and less intrusive sources. Then the testimony is received *in camera*.

State ex rel. Pflaum v. Psychology Examining Bd., 111 Wis. 2d 643, 645, 331 N.W.2d 614 (Ct. App. 1983).

The definition of a patient does not include a person submitting to examination for scientific purposes. For the privilege to apply, the patient must be "treated."

State v. Beno, 110 Wis. 2d 40, 51–52, 327 N.W.2d 712 (Ct. App. 1982), *rev'd on other grounds*, 116 Wis. 2d 122, 341 N.W.2d 668 (1984).

The privilege exempting a legislator from civil process under Wis. Const. art. IV, § 15, does not extend to a legislator's aide.

Davison v. St. Paul Fire & Marine Ins. Co., 75 Wis. 2d 190, 197–98, 248 N.W.2d 433 (1977).

Statutory privileges and confidentialities have consistently been strictly interpreted. A strict construction of statutorily granted privileges is in accord with the generally expressed attitudes of the commentators advocating a narrowing of the field of privileges.

905.015 Interpreters for persons with language difficulties, limited English proficiency, or hearing or speaking impairments.

(1) If an interpreter for a person with a language difficulty, limited English proficiency, as defined in s. 885.38(1)(b), or a hearing or speaking impairment interprets as an aid to a communication which is privileged by statute, rules adopted by the supreme court, or the U.S. or state constitution, the interpreter may be prevented from disclosing the communication by any person who has a right to claim the privilege. The interpreter may claim the privilege but only on behalf of the person who has the right. The authority of the interpreter to do so is presumed in the absence of evidence to the contrary.

(2) In addition to the privilege under sub. (1), a person who is licensed as an interpreter under s. 440.032(3) may not disclose any aspect of a confidential communication facilitated by the interpreter unless one of the following conditions applies:

(a) All parties to the confidential communication consent to the disclosure.

(b) A court determines that the disclosure is necessary for the proper administration of justice.

905.02 Required reports privileged by statute.

A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if provided by law. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if provided by law. No privilege exists under this section in actions involving false swearing, fraudulent writing, fraud in the return or report, or other failure to comply with the law in question.

Judicial Council Committee's Note (1974)

Wisconsin is in accord. *State v. Miller*, 35 Wis. 2d 454, 151 N.W.2d 157 (1967); *Hammill v. State*, 52 Wis. 2d 118, 187 N.W.2d 792 (1971); *Adoption of Brown*, 5 Wis. 2d 428, 92 N.W.2d 749 (1958); *Banas v. State*, 34 Wis. 2d 468, 149 N.W.2d 571 (1967), *certiorari denied* 389 U.S. 962, 88 S. Ct. 346, 19 L. Ed. 2d 373; *Will of Porter*, 178 Wis. 556, 190 N.W. 473 (1922); *State v. Driscoll*, 53 Wis. 2d 699, 193 N.W.2d 851 (1972); Compare *Luedtke v. Shedivy*, 51 Wis. 2d 110, 186 N.W.2d 220 (1971). The terms "perjury" and "false statements" contained in the Proposed Federal Rule were changed to "false swearing" and "fraudulent writings" to conform with ss. 946.32 and 943.39(3). Substitution of the phrase "if provided by law" for the provision of the Federal Rule "if the law requiring it to be made so provides" is designed to assure that the privilege arising by virtue of this rule may originate in the statute requiring the report or return or in another statute that is in pari materia.

Illustrative of the statutes that are the subject of this section are the following:

S. 48.26—Peace officer's records concerning children under 18.
S. 48.78—Records received concerning individuals in licensed child welfare agencies, day care centers and maternity hospitals.
S. 48.93—Adoption proceedings.
S. 71.11 [S. 71.78]—Income and franchise taxes.
S. 143.07—Communicable diseases.
S. 247.08(1)—Reconciliation effort report.
S. 346.73—Accident reports confidential.

Acts of Congress or statutes of other states which grant a privilege to a report would be recognized in Wisconsin by this section.

Authors' Note. *See also* Wis. Stat. §§ 165.79 (crime laboratory evidence and reports conditionally privileged before trial; privilege may be available to felony defendant), 146.38 (proceedings and reports of hospital staff peer review committees), 904.16 (health care reports).

Case Annotations

State ex rel. Herget v. Waukesha Cnty. Cir. Ct., 84 Wis. 2d 435, 449, 267 N.W.2d 309 (1978).

Although juvenile police records that are the subject of former Wis. Stat. § 48.26 (now Wis. Stat. §§ 48.396 and 938.396) are privileged records by virtue of this section, they are not absolutely privileged and can be discovered in limited circumstances.

Davison v. St. Paul Fire & Marine Ins. Co., 75 Wis. 2d 190, 199–200, 248 N.W.2d 433 (1977).

Before April 3, 1976, the effective date of Wis. Stat. § 146.38, no statutory privilege existed that protected the proceedings and reports of hospital staff peer review committees from discovery in civil litigation.

Chapter 13
Lawyer-Client Privilege

905.03 Lawyer-client privilege.

(1) DEFINITIONS. As used in this section:

(a) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(b) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(c) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(d) A communication is "confidential" if not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(2) GENERAL RULE OF PRIVILEGE. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: between the client or the client's representative and the client's lawyer or the lawyer's representative; or between the client's lawyer and the lawyer's representative; or by the client or the client's lawyer to a lawyer representing another in a matter of common interest; or between representatives of the client or between the client and a representative of the client; or between lawyers representing the client.

(2m) PRIVILEGE WHEN CLIENT IS A FIDUCIARY. When a lawyer represents a client who is serving as a personal representative, trustee, trust protector, directing party, guardian, conservator, guardian ad litem, attorney in fact for financial matters, health care agent, or other fiduciary, the lawyer's client is the person who is acting as a fiduciary, and not anyone to whom the client owes fiduciary or other duties, and communication between the lawyer and such a client is protected from disclosure to the same extent as if the client was not acting as a fiduciary. The privilege may be claimed by the client, or otherwise as provided in sub. (3), even against anyone to whom the client owes fiduciary or other duties.

(3) WHO MAY CLAIM THE PRIVILEGE. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. The lawyer's authority to do so is presumed in the absence of evidence to the contrary.

(4) EXCEPTIONS. There is no privilege under this rule:

(a) *Furtherance of crime or fraud*. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(b) *Claimants through same deceased client*. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(c) *Breach of duty by lawyer or client*. As to a communication relevant to an issue of breach of duty by the lawyer to the lawyer's client or by the client to the client's lawyer; or

(d) *Document attested by lawyer*. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(e) *Joint clients*. As to a communication relevant to a matter of common interest between 2 or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

(5) FORFEITURE OF PRIVILEGE.

(a) *Effect of inadvertent disclosure*. A disclosure of a communication covered by the privilege, regardless of where the disclosure occurs, does not operate as a forfeiture if all of the following apply:

1. The disclosure is inadvertent.

2. The holder of the privilege or protection took reasonable steps to prevent disclosure.

3. The holder promptly took reasonable steps to rectify the error, including, if applicable, following the procedures in s. 804.01 (7).

(b) *Scope of forfeiture*. A disclosure that constitutes a forfeiture under par. (a) extends to an undisclosed communication only if all of the following apply:

1. The disclosure is not inadvertent.

2. The disclosed and undisclosed communications concern the same subject matter.

3. The disclosed and undisclosed communications ought in fairness to be considered together.

Judicial Council Note (2012)

Attorneys and those who work with them owe clients and their confidences the utmost respect. Preserving confidences is one of the profession's highest duties. Arguably, strict rules about the consequences of disclosing confidences, even inadvertently, may serve to promote greater care in dealing with privileged information. However, precaution comes at a price. In the digital era, when information is stored, exchanged and produced in considerably greater volumes and in different formats than in earlier eras, thorough preproduction privilege review often can be prohibitively expensive. Most clients seek a balanced approach.

The various approaches available are discussed in the Advisory Committee Note and in *Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust*, 2004 WI 57, ¶¶ 28–32, nn.15–17, 271 Wis. 2d 610. Sub. (5) represents an "intermediate" or "middle ground" approach, which is also an approach taken in a majority of jurisdictions. Clients and lawyers are free to negotiate more stringent precautions when circumstances warrant.

Sub. (5) is not intended to have the effect of overruling any holding in *Sampson*. *Sampson* holds that a lawyer's deliberate disclosure, without the consent or knowledge of the client, does not waive the lawyer-client privilege. Neither subpart of sub. (5) alters this rule. Sub. (5)(a) shields certain inadvertent disclosures but does not disturb existing law regarding deliberate disclosures. Deliberate disclosures

might come into play under sub. (5)(b), which provides that, when a disclosure is not inadvertent, a privilege forfeiture under sub. (5)(a) may extend to undisclosed communications and information as well. However, such an extension ensues only when fairness warrants. Fairness does not warrant the surrender of additional privileged communications and information if the initial disclosure is neutralized by the *Sampson* rule.

In judging whether the holder of the privilege or protection took reasonable steps to prevent disclosure or to rectify the error, it is appropriate to consider the non-dispositive factors discussed in the Advisory Committee Note: (1) the reasonableness of precautions taken, (2) the time taken to rectify the error, (3) the scope of discovery, (4) the extent of disclosure, (5) the number of documents to be reviewed, (6) the time constraints for production, (7) whether reliable software tools were used to screen documents before production, (8) whether an efficient records management system was in place before litigation; and (9) any overriding issue of fairness.

Measuring the time taken to rectify an inadvertent disclosure should commence when the producing party first learns, or, with reasonable care, should have learned that a disclosure of protected information was made, rather than when the documents were produced. This standard encourages respect for the privilege without greatly increasing the cost of protecting the privilege.

In judging the fourth factor, which requires a court to determine the quantity of inadvertently produced documents, it is appropriate to consider, among other things, the number of documents produced and the percentage of privileged documents produced compared to the total production.

In assessing whether the software tools used to screen documents before production were reliable, it is appropriate, given current technology, to consider whether the producing party designed a search that would distinguish privileged documents from others to be produced and conducted assurance testing before production through methods commonly available and accepted at the time of the review and production.

Sub. (5) employs a distinction drawn lately between the terms "waiver" and "forfeiture." *See State v. Ndina*, 2009 WI 21, ¶¶ 28–31, 315 Wis. 2d 653.

Out of respect for principles of federalism and comity with other jurisdictions, sub. (5) does not conclusively resolve whether privileged communications inadvertently disclosed in proceedings in other jurisdictions may be used in Wisconsin proceedings; nor whether privileged communications inadvertently disclosed in Wisconsin proceedings may be used in proceedings in other jurisdictions. Sub. (5) states that it applies "regardless of where the disclosure occurs," but to the extent that the law of another jurisdiction controls the question, it is not trumped by sub. (5). The prospect for actual conflicts is minimized because sub. (5) is the same or similar to the rule applied

in the majority of jurisdictions that have addressed this issue. If conflicts do arise, for example, because a rule dictates that a disclosure in a jurisdiction other than Wisconsin should be treated as a forfeiture in Wisconsin, or that a disclosure in Wisconsin should be treated as a forfeiture in a jurisdiction other than Wisconsin, a court should consider a choice-of-law analysis. *See Beloit Liquidating Trust v. Grade*, 2004 WI 39, ¶¶ 24–25, 270 Wis. 2d 356.

The language of sub. (5) also differs from the language of Rule 502 in a way that should not be considered material. Sub. (5) applies to a privileged "communication." Rule 502 applies to a privileged "communication or information." The reason for the difference is that sub. (5) is grafted onto sub. (2), which states the general rule regarding the lawyer-client privilege in terms of "communications" between lawyers and clients, not "communications and information." Sub. (5) follows suit. This different language is not intended to alter the scope of the lawyer-client privilege or to provide any less protection against inadvertent disclosure of privileged information than is provided by Rule 502.

Sub. (5) is modeled on subsections (a) and (b) of Fed. R. Evid. 502. The following excerpts from the Committee Note of the federal Advisory Committee on Evidence Rules (Revised 11/28/2007) and the Statement of Congressional Intent regarding Rule 502 are instructive, though not binding, in understanding the scope and purposes of those portions of Rule 502 that are borrowed here:

> This new [federal] rule has two major purposes:
>
> 1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product—specifically those disputes involving inadvertent disclosure and subject matter waiver.
>
> 2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. *See, e.g.*, *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D. Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").
>
> The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. Moreover, if a federal court's confidentiality order is not

enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

…

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g.*, *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. *See* Rule 502(b). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver—"ought in fairness"—is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D. Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D. N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

STATEMENT OF CONGRESSIONAL INTENT REGARDING RULE 502 OF THE FEDERAL RULES OF EVIDENCE

During consideration of this rule in Congress, a number of questions were raised about the scope and contours of the effect of the proposed rule on current law regarding attorney-client privilege and work-product protection. These questions were ultimately answered satisfactorily, without need to revise the text of the rule as submitted to Congress by the Judicial Conference.

In general, these questions are answered by keeping in mind the limited though important purpose and focus of the rule. The rule addresses only the effect of disclosure, under specified circumstances, of a communication that is otherwise protected by attorney-client privilege, or of information that is protected by work-product protection, on whether the disclosure itself operates as a waiver of the privilege or protection for purposes of admissibility of evidence in a federal or state judicial or administrative proceeding. The rule does not alter the substantive law regarding attorney-client privilege or work-product protection in any other respect, including the burden on the party invoking the privilege (or protection) to prove that the particular information (or communication) qualifies for it. And it is not intended to alter the rules and practices governing use of information outside this evidentiary context.

Some of these questions are addressed more specifically below, in order to help further avoid uncertainty in the interpretation and application of the rule.

Subdivision (a)—Disclosure vs. Use

This subdivision does not alter the substantive law regarding when a party's strategic use in litigation of otherwise privileged information obliges that party to waive the privilege regarding other information concerning the same subject matter, so that the information being used can be fairly considered in context. One situation in which this issue arises, the assertion as a defense in patent-infringement litigation that a party was relying on advice of counsel, is discussed elsewhere in this Note. In this and similar situations, under subdivision (a)(1) the party using an attorney-client communication to its advantage in the litigation has, in so doing, intentionally waived the privilege as to other communications concerning the same subject matter, regardless of the circumstances in which the communication being so used was initially disclosed.

Subdivision (b)—Fairness Considerations

The standard set forth in this subdivision for determining whether a disclosure operates as a waiver of the privilege or protection is, as explained elsewhere in this Note, the majority rule in the federal courts. The majority rule has simply been distilled here into a standard designed to be predictable in its application. This distillation is not intended to foreclose notions of fairness from continuing to inform application of the standard in all aspects as appropriate in particular cases-for example, as to whether steps taken to rectify an erroneous inadvertent disclosure were sufficiently prompt under subdivision (b)(3) where the receiving party has relied on the information disclosed.

Judicial Council Committee's Note (1974)

Sub. (1)(a). Wisconsin is in accord. Definition of "client" in Wis. Stat. s. 885.22 (1969) includes persons, *State v. Dombrowski*, 44 Wis. 2d 486, 171 N.W.2d 349 (1969), *Foryan v. Firemen's Fund Ins. Co.*, 27 Wis. 2d 133, 133 N.W.2d 724 (1965); corporations, *State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis. 2d 559, 150 N.W.2d 387, 35 A.L.R.3d 377 (1967), *Tomek v. Farmers Mut. Auto. Ins. Co.*, 268 Wis. 566, 68 N.W.2d 573 (1955); and public officers, *State ex rel. Reynolds v. Circuit Court for Waukesha County*, 15 Wis. 2d 311, 112 N.W.2d 686, 113 N.W.2d 537 (1961). Wis. Stat. s. 885.22 (1969) is repealed.

(b). Wisconsin is in accord with definitions of a lawyer authorized to practice law in a state, Wis. Stat. s. 256.28 (1969). However, the adoption of this subsection extends the privilege of the client to communications had with persons who the client "reasonably believed" were authorized to practice law. The burden is placed on the client to show that he or she had information or facts that would lead a reasonable person to believe that the person he or she disclosed a confidential communication to was an authorized

lawyer. This is contrary to *Brayton v. Chase*, 3 Wis. 456 (1854), where it was held that the communication must be made to a licensed lawyer.

(c). Wisconsin is in accord. *State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis. 2d 559, 150 N.W.2d 387, 35 A.L.R.3d 377 (1967).

(d). Wisconsin is in accord. Wis. Stat. s. 885.22 (1969); *State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis. 2d 559, 150 N.W.2d 387, 35 A.L.R.3d 377 (1967); *Hoffman v. Labutzke*, 233 Wis. 365, 289 N.W. 652 (1940); *Koeber v. Somers*, 108 Wis. 497, 84 N.W. 991, 52 L.R.A. 512 (1901); *Herman v. Schlesinger*, 114 Wis. 382, 90 N.W. 460, 91 Am. St. Rep. 922 (1902); *State v. Dombrowski*, 44 Wis. 2d 486, 171 N.W.2d 349 (1969); *Estate of Hoehl*, 181 Wis. 190, 193 N.W. 514 (1923).

Sub. (2). Wisconsin is in accord. Wis. Stat. s. 885.22 (1969); *State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis. 2d 559, 150 N.W.2d 387, 35 A.L.R.3d 377 (1967); *Kearney & Trecker v. Giddings and Lewis, Inc.*, 296 F. Supp. 979 (E.D. Wis. 1969); *State ex rel. Reynolds v. Circuit Court for Waukesha County*, 15 Wis. 2d 311, 113 N.W.2d 537 (1962); *Continental Casualty Co. v. Pogorzelski*, 275 Wis. 350, 82 N.W.2d 183 (1957); *Dickson v. Bills*, 144 Wis. 171, 128 N.W. 868 (1910); *Dudley v. Beck*, 3 Wis. 274 (1854); *Foryan v. Firemen's Fund Ins. Co.*, 27 Wis. 2d 133, 133 N.W.2d 724 (1965); *Horlick's Malted Milk Co. v. A. Spiegel Co.*, 155 Wis. 201, 144 N.W. 272 (1913); *Wojciechowski v. Baron*, 274 Wis. 364, 80 N.W.2d 434 (1957).

The protection against eavesdropping has been extended in this section.

Sub. (3). Wisconsin is in accord. Wis. Stat. s. 885.22 (1969). *Petition of Sawyer*, 129 F. Supp. 687 (E.D. Wis. 1955); *State v. Dombrowski*, 44 Wis. 2d 486, 171 N.W.2d 349 (1969); *Foryan v. Firemen's Fund Ins. Co.*, 27 Wis. 2d 133, 133 N.W.2d 724 (1965); *State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis. 2d 559, 150 N.W.2d 387, 35 A.L.R.3d 377 (1967); *Tomek v. Farmers Mut. Auto. Ins. Co.*, 268 Wis. 566, 68 N.W.2d 573 (1955); *State ex rel. Reynolds v. Circuit Court for Waukesha County*, 15 Wis. 2d 311, 113 N.W.2d 537 (1961).

Sub. (4). Exceptions.

(a). Wisconsin is in accord. *In re Sawyer's Petition*, 229 F.2d 805 (1956), *certiorari denied Sawyer v. Barczak*, 351 U.S. 966, 76 S. Ct. 1025, 100 L. Ed. 1486, *rehearing denied* 352 U.S. 860, 77 S. Ct. 24, 1 L. Ed.2d 70; *Dudley v. Beck*, 3 Wis. 274 (1854).

(b). Wisconsin is in accord. *Estate of Smith*, 263 Wis. 441, 57 N.W.2d 727 (1953); *Allen v. Ross*, 199 Wis. 162, 225 N.W. 831, 65 A.L.R. 180 (1929).

(c). Wisconsin is in accord. Wis. Stat. s. 885.22 (1969); *State v. Markey*, 259 Wis. 527, 49 N.W.2d 437 (1951); *Murphey v. Gates*, 81 Wis. 370, 51 N.W. 573 (1892).

(d). Wisconsin is in accord. *Boyle v. Robinson*, 129 Wis. 567, 109 N.W. 623 (1906); *McMaster v. Scriven*, 85 Wis. 162, 55 N.W. 149, 39 Am. St. Rep. 829 (1893).

(e). Wisconsin is in accord. *Allen v. Ross*, 199 Wis. 162, 225 N.W. 831, 65 A.L.R. 180 (1929); *Johnson v. Andreassen*, 227 Wis. 415, 278 N.W. 877 (1938); *Hoffman v. Labutzke*, 233 Wis. 365, 289 N.W. 652 (1940); *Boyle v. Kempkin*, 243 Wis. 86, 9 N.W.2d 589 (1943).

Case Annotations

(1) Definitions

(a) Client

(b) Lawyer

(c) Representative of the Lawyer

(d) Confidential

State v. Boyd, 2011 WI App 25, ¶¶ 19–23, 331 Wis. 2d 697, 797 N.W.2d 546.

The attorney-client privilege only encompasses confidential communications. Thus, the court rejected a criminal defendant's complaint that his attorney had disclosed to the court questions that the defendant had wanted him to ask witnesses during the trial, because such questions were not confidential. The questions would have been revealed if the defendant had gotten what he wanted.

The attorney-client privilege is waived by a client's claim that his attorney was constitutionally ineffective, including a claim that there was a "lack of communication." Otherwise, the reviewing court could not assess the claim since it would have nothing to review except the defendant's assertion.

Estrada v. State (In re Subpoena of Steckbauer), 228 Wis. 2d 459, 463–64, 596 N.W.2d 496 (Ct. App. 1999).

A videotaped interview of a crime victim conducted by the accused's spouse for the purpose of securing legal advice on behalf of the accused was not a privileged attorney-client communication. Even though the spouse gave the videotape to an attorney, it was not confidential, because it was made in the presence of a third person—in this case, the victim—who was not reasonably necessary for the transmission of the communication to the attorney.

Wisconsin Newspress, Inc. v. School Dist., 199 Wis. 2d 768, 782–83, 546 N.W.2d 143 (1996).

Even if documents are otherwise subject to disclosure under Wisconsin's public records law, the attorney-client privilege may still apply. If the disclosure of correspondence from an attorney to the client would indirectly reveal the substance of the client's confidential communications to the attorney, the privilege applies.

(2) General Rule of Privilege

Dilger v. Metropolitan Prop. & Cas. Ins. Co., 2015 WI App 54, ¶¶ 21, 22, 24, 364 Wis. 2d 410, 868 N.W.2d 177.

Work-product and attorney-client-privilege protections apply to shield insurance company documents prepared in anticipation of litigation regardless of whether litigation had commenced at the time of preparation or whether the litigation is the proceeding in which the privilege is asserted.

Dyer v. Blackhawk Leather LLC, 2008 WI App 128, ¶¶ 8–11, 313 Wis. 2d 803, 758 N.W.2d 167.

A memo from an attorney to his client giving legal advice does not lose its privileged status because it also contains business advice.

An inadvertent disclosure of a privileged document by the client's lawyer during discovery does not destroy its privileged status, because the privilege belongs to the client and not to the lawyer.

State v. Meeks, 2003 WI 104, ¶¶ 40, 58, 263 Wis. 2d 794, 666 N.W.2d 859.

An attorney's opinions, perceptions, and impressions of a client's competency are protected by the attorney-client privilege, because they are necessarily based on private contact with the client. Confidential communications must be interpreted to include both verbal and nonverbal communications.

State v. Hydrite Chem. Co., 220 Wis. 2d 51, 63–70, 582 N.W.2d 411 (Ct. App. 1998).

Wisconsin follows a restrictive view of the "at issue" exception to the attorney-client privilege. Under this view, a privilege holder waives the attorney-client privilege when a privileged document becomes relevant, i.e., "at issue" to an asserted claim or defense, only if the privilege holder intends to use the document to prove the claim or defense.

Swan Sales Corp. v. Jos. Schlitz Brewing Co., 126 Wis. 2d 16, 31, 374 N.W.2d 640 (Ct. App. 1985).

The mere fact that an attorney offers to testify as a witness does not automatically waive the lawyer-client privilege or work-product doctrine as to documents reviewed by the attorney in preparing to testify.

Jax v. Jax, 73 Wis. 2d 572, 579–81, 243 N.W.2d 831 (1976).

The mere showing that the communication was from a client to the client's attorney is insufficient to warrant a finding that the communication is privileged. When a claim

of privilege is challenged, the trial court should hold a hearing, not only with respect to the existence of the relationship but also with respect to the nature of the information sought to be obtained. The privilege protects communications and not necessarily facts or evidence. An attorney may usually testify to the circumstances surrounding the preparation and execution of a document that is intended to be made public or to be relayed to a third party.

(3) Who May Claim the Privilege

Lane v. Sharp Packaging Sys., Inc., 2002 WI 28, ¶¶ 33–34, 40, 55, 251 Wis. 2d 68, 640 N.W.2d 788.

A former director of a corporation cannot waive the lawyer-client privilege on behalf of the corporation, even if the documents at issue were prepared during his tenure as director.

The lawyer-client privilege only protects communications from the lawyer to the client if their disclosure would directly or indirectly reveal the substance of the client's confidential communications to the lawyer. In the discovery dispute in this case, billing records containing detailed descriptions of the nature of the legal services rendered to the client revealed the substance of lawyer-client communications and were therefore privileged.

Once the circuit court determines that a prima facie case of fraud has been established, an *in camera* review is the proper procedure to determine whether the crime-fraud exception to the lawyer-client privilege applies.

(4) Exceptions

(a) Furtherance of Crime or Fraud

(b) Claimants Through Same Deceased Client

(c) Breach of Duty by Lawyer or Client

State v. Simpson, 200 Wis. 2d 798, 804–06, 548 N.W.2d 105 (Ct. App. 1996).

Waiver of the attorney-client privilege is not limited to circumstances in which a client directly attacks an attorney's performance by suing the attorney for legal malpractice or by seeking to reverse a criminal conviction on the grounds of ineffective assistance of counsel. A client may also waive the privilege by moving to withdraw a plea on the grounds that it was not made knowingly, voluntarily, and intelligently, because such a motion necessarily draws into question the performance of the attorney's duty to provide proper legal advice.

State v. Flores, 170 Wis. 2d 272, 277–78, 488 N.W.2d 116 (Ct. App. 1992).

A defendant's lawyer-client privilege is waived to the extent that counsel must answer questions relevant to the defendant's charges of ineffective assistance.

Dyson v. Hempe, 140 Wis. 2d 792, 804–05, 809–10, 813–19, 413 N.W.2d 379 (Ct. App. 1987).

A client who abuses the lawyer-client relationship waives it; however, the mere charge of fraud will not set the confidences free. To drive the privilege away there must be something to give color to the charge. It is questionable whether merely maintaining what may be a frivolous action constitutes a kind of fraud that frees otherwise confidential communications from the lawyer-client privilege. It may be appropriate in certain circumstances to cautiously use *in camera* proceedings to resolve disputed issues of privilege.

The "litigation exception" found in the physician-patient privilege was deliberately omitted from the lawyer-client privilege by the drafters. There is no public policy independent of the statute that a client who sues for malpractice thereby waives any privilege in litigation. Thus, the only communications exempted from the privilege are between the client and the lawyer who is accused of the breach of duty.

Because the lawyer-client privilege is an obstacle to the investigation of the truth, it should be strictly confined within the narrowest possible limits consistent with the logic of the principle.

The fact of the existence of a lawyer-client relationship is collateral to but not an ingredient of a confidential communication. Therefore, a client can be compelled to reveal the names of other lawyers consulted.

The general nature of communications that the client has with a lawyer is protected by the privilege.

The privilege does not protect the client from searching discovery process that may force the client to disgorge what the client knows about the case, at least in civil actions.

A party cannot conceal a fact merely by revealing it to the party's lawyer. A lawyer may be questioned regarding conversation with the client's present lawyer as long as the lawyer's testimony does not reveal communications between the lawyer and the client. Communications between the attorney and a person not the lawyer's client while conducting business for such client are not privileged.

The lawyer-client relationship does not apply to communications respecting fees between the client and the lawyer.

(d) Document Attested by Lawyer

(e) Joint Clients

Fouts v. Breezy Point Condo. Ass'n, 2014 WI App 77, ¶¶ 12, 19–21, 355 Wis. 2d 487, 851 N.W.2d 845.

As a client, a private association may refuse to disclose attorney-client communications to a current board member pursuant to the entity rule. The corporate entity, not each individual member, holds the privilege. The power to waive the privilege rests solely with corporate management. Individual members are bound by

majority rule, and the joint-clients exception to the rule of attorney-client privilege does not apply.

State v. Hydrite Chem. Co., 220 Wis. 2d 51, 76–77, 582 N.W.2d 411 (Ct. App. 1998).

Wisconsin does not recognize a "common interest" exception to the attorney-client privilege outside the parameters of Wis. Stat. § 905.03(4)(e). Under this provision, an attorney must be "retained or consulted in common" by two or more clients for the exception to apply.

(5) Forfeiture of Privilege

Chapter 14

Privilege Between Certain Health-Care Providers and Patients; Domestic Violence Advocate-Victim Privilege

905.04 Privilege between certain health-care providers and patients.

(1) DEFINITIONS. In this section:

(a) "Chiropractor" means a person licensed under s. 446.02, or a person reasonably believed by the patient to be a chiropractor.

(b) A communication or information is "confidential" if not intended to be disclosed to 3rd persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication or information or persons who are participating in the diagnosis and treatment under the direction of the physician, naturopathic doctor, podiatrist, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist, or professional counselor including the members of the patient's family.

(bm) "Marriage and family therapist" means an individual who is licensed as a marriage and family therapist under subch. I of ch. 457 or an individual reasonably believed by the patient to be a marriage and family therapist.

(br) "Naturopathic doctor" means a naturopathic doctor, as defined in s. 990.01(22m), or an individual reasonably believed by the patient to be a naturopathic doctor.

(c) "Patient" means an individual, couple, family or group of individuals who consults with or is examined or interviewed by a physician, naturopathic doctor, podiatrist, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

(d) "Physician" means a person as defined in s. 990.01(28), or reasonably believed by the patient so to be.

(dg) "Podiatrist" means a person licensed under s. 448.63 or a person reasonably believed by the patient to be a podiatrist.

(dm) "Professional counselor" means an individual who is licensed as a professional counselor under subch. I of ch. 457, an individual who is exercising the privilege to practice, as defined in s. 457.50 (2) (s), in this state, or an individual reasonably believed by the patient to be a professional counselor.

(e) "Psychologist" means a psychologist as defined in s. 990.01(31m), or a person reasonably believed by the patient to be a psychologist.

(f) "Registered nurse" means a registered nurse who is licensed under s. 441.06 or who holds a multistate license, as defined in s. 441.51(2)(h), issued in a party state, as defined in s. 441.51(2)(k), or a person reasonably believed by the patient to be a registered nurse.

(g) "Social worker" means an individual who is certified or licensed as a social worker, advanced practice social worker, independent social worker, or clinical social worker under subch. I of ch. 457 or an individual reasonably believed by the patient to be a social worker, advanced practice social worker, independent social worker, or clinical social worker.

(2) GENERAL RULE OF PRIVILEGE. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, the patient's naturopathic doctor, the patient's podiatrist, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, naturopathic doctor, podiatrist, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

(3) WHO MAY CLAIM THE PRIVILEGE. The privilege may be claimed by the patient, by the patient's guardian or conservator, or by the personal representative of a deceased patient. The person who was the physician, naturopathic doctor, podiatrist, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor may claim the privilege but only on behalf of the patient. The authority so to do is presumed in the absence of evidence to the contrary.

(4) EXCEPTIONS.

(a) *Proceedings for commitment, guardianship, protective services, or protective placement or for control, care, or treatment of a sexually violent person*. There is no privilege under this rule as to communications and information relevant to an issue in probable cause or final proceedings to commit the patient for mental illness under s. 51.20, to appoint a guardian in this state, for court-ordered protective services or protective placement, for review of guardianship, protective services, or protective placement orders, or for control, care, or treatment of a sexually violent person under ch. 980, if the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist, or professional counselor in the course of diagnosis or treatment has determined that the patient is in need of commitment, guardianship, protective services, or protective placement or control, care, and treatment as a sexually violent person.

(am) *Proceedings for guardianship*. There is no privilege under this rule as to information contained in a statement concerning the mental condition of the patient furnished to the court by a physician or psychologist under s. 54.36(1) or s. 880.33(1), 2003 stats.

(b) *Examination by order of judge*. If the judge orders an examination of the physical, mental or emotional condition of the patient, or evaluation of the patient for purposes of guardianship, protective services or protective placement, communications made and treatment records reviewed in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(c) *Condition an element of claim or defense*. There is no privilege under this section as to communications relevant to or within the scope of discovery examination of an issue of the physical, mental or emotional condition of a patient in any proceedings in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

(d) *Homicide trials*. There is no privilege in trials for homicide when the disclosure relates directly to the facts or immediate circumstances of the homicide.

(e) *Abused or neglected child or abused unborn child.*

2m. There is no privilege for information contained in a report of child abuse or neglect that is provided under s. 48.981(3).

3. There is no privilege in situations where the examination of the expectant mother of an abused unborn child creates a reasonable ground for an opinion of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor that the physical injury inflicted on the unborn child was caused by the habitual lack of self-control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.

(em) *School violence.* There is no privilege for information contained in a report of a threat of violence in or targeted at a school that is provided under s. 175.32(3).

(f) *Tests for intoxication.* There is no privilege concerning the results of or circumstances surrounding any chemical tests for intoxication or alcohol concentration, as defined in s. 340.01(1v).

(g) *Paternity proceedings*. There is no privilege concerning testimony about the medical circumstances of a pregnancy or the condition and characteristics of a child in a proceeding to determine the paternity of that child under subch. IX of ch. 767.

(h) *Reporting wounds and burn injuries*. There is no privilege regarding information contained in a report under s. 255.40 pertaining to a patient's name and type of wound or burn injury.

(i) *Providing services to court in juvenile matters*. There is no privilege regarding information obtained by an intake worker or dispositional staff in the provision of services under s. 48.067, 48.069, 938.067 or 938.069. An intake worker or dispositional staff member may disclose information obtained while providing services under s. 48.067 or 48.069 only as provided in s. 48.78 and may disclose information obtained while providing services under s. 938.067 or 938.069 only as provided in s. 938.78.

Law Revision Committee Notes (1987 Act 264)

The uniform use of the term "license" will greatly simplify statutory terms referring to the document conferring the privilege of practicing as a registered nurse.

Judicial Council Committee's Note (1974)

Rule 504 of the Proposed Federal Rules does not recognize a physician-patient privilege and is specifically limited to a psychotherapist. The Wisconsin draft of Rule 504 maintains most of the present concepts of Wis. Stat. s. 885.21 (Communications to Doctors). This section differs from the proposed Federal Rule: (1) by not extending the privilege to confidential communications made to a psychologist practicing psychotherapy; (2) by continuing a general physician-patient privilege that applies to the practice of medicine generally and is not limited to psychotherapy.

Sub. (1)(a). The same patient relationship that existed under Wis. Stat. s. 885.21 is maintained.

(b). The definition of physician is extended to include not only a licensed physician, but a person who the patient has reasonable grounds to believe is a physician. The burden is placed on the patient to satisfy the court that he in fact had reasonable grounds to believe that the person he made the communication to or disclosed information to was a physician before the patient can invoke the privilege.

(c). Wisconsin is in accord with this definition as it applies to confidential communications or information, s. 885.21, however, a broader approach is taken in that disclosure to persons such as consulting physicians, nurses, hospital staff or members of the family would not negate the privilege, if such disclosure would further the interest of the patient.

(2). Wisconsin is in accord with respect to the application of this subsection to a physician. Wis. Stat. s. 885.21. The subsection expands the privilege to persons participating in diagnosis and treatment, such as nurses, resident physicians, medical technologists and family members, as long as these persons are participating in the diagnosis and treatment.

(3). Wisconsin is in accord. Wis. Stat. s. 885.21.

Sub. (4)(a). Proposed Federal Rule 504(d)(1) is adopted and expanded to a physician generally. Wisconsin is in accord. Wis. Stat. s. 885.21(1)(b).

(b). Proposed Federal Rule 504(d)(2) is adopted and expanded to include communications or information gained in court-ordered physical examinations. Wis. Stat. s. 971.18 would limit this section in criminal cases in that it prohibits disclosure of statements made by a person subject to psychiatric examination or treatment under Chapter 971, other than to determine his mental condition. Under Wis. Stat. s. 971.18 the judge would not have a right to order disclosure of such statement except to determine the mental condition of the defendant.

(c). Proposed Federal Rule 504(d)(3) is adopted with change to apply to "physical" as well as mental or emotional conditions.

(d). The present Wis. Stat. s. 885.21(1)(a) is adopted. There is no counterpart in the proposed Federal Rule.

(e). The present Wis. Stat. s. 885.21(1)(f) is adopted. There is no counterpart in the proposed Federal Rule.

Case Annotations

(1) Definitions

(b) Confidential

State v. Joseph P. (In re Joy P.), 200 Wis. 2d 227, 234–35, 546 N.W.2d 494 (Ct. App. 1996).

To assert a privilege against the disclosure of a communication to a health-care provider, the patient must show an objectively reasonable belief by the patient that the communications were confidential and that the communications were made for the purposes of diagnosis or treatment. The health-care provider's perception of the relationship is not relevant to the inquiry into the patient's beliefs.

State v. Cramer, 91 Wis. 2d 553, 564–65, 283 N.W.2d 625 (Ct. App. 1979), *aff'd*, 98 Wis. 2d 416, 296 N.W.2d 921 (1980).

Communications to a psychologist in a Wis. Stat. ch. 975 proceeding (sex crimes) are not confidential within the meaning of this section.

(2) General Rule of Privilege

State v. Johnson, 2023 WI 39, ¶ 1 n.3, 407 Wis. 2d 195, 990 N.W.2d 174.

In this sexual assault case, the court expressly overruled *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), in which the court of appeals had created a process for a criminal defendant to seek *in camera* review of a victim's privately held, privileged health-care records upon a showing of materiality. *Shiffra* was refined by the supreme court in *State v. Green*, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298, and was followed in several other cases, including *State v. Rizzo*, 2002 WI 20, 250 Wis. 2d 407, 640 N.W.2d 93, *State v. Solberg*, 211 Wis. 2d 372, 564 N.W.2d 775 (1997), and *State v. Behnke*, 203 Wis. 2d 43, 553 N.W.2d 265 (Ct. App. 1996). The *Shiffra* holding was based in part on earlier cases, *see State v. S.H.*, 159 Wis. 2d 730, 465 N.W.2d 238 (Ct. App. 1990), and *Rock County Department of Social Services v. DeLeu,* 143 Wis. 2d 508, 422 N.W.2d 142 (Ct. App. 1988). Those cases were likewise overruled to the extent they permitted *in camera* review of the type of records at issue in *Shiffra*. *Shiffra* relied in part on *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); the *Johnson* court concluded the *Shiffra* court had misapplied *Ritchie* and stated that its opinion should not be read as questioning *Ritchie* itself or the applicability of *Ritchie*'s procedure for *in camera* review of confidential agency records in the state's possession.

Crawford v. Care Concepts, Inc., 2001 WI 45, ¶¶ 1, 12–28, 243 Wis. 2d 119, 625 N.W.2d 876.

In a personal-injury action stemming from the plaintiff's assault by a nursing home patient, the plaintiff was entitled to discover records maintained by the facility relating to the patient's assaultive or disruptive behavior. Records of such behavior were not a confidential communication protected by the privilege.

State v. Thompson, 222 Wis. 2d 179, 190, 585 N.W.2d 905 (Ct. App. 1998).

Wis. Stat. § 905.04 does not regulate the conduct of physicians outside the courtroom and does not give patients a right to exclude others from treatment areas at hospitals. Thus, in this case, the court found no merit in the privilege-based argument of a criminal defendant who sought to exclude from trial evidence that a police officer had seized from a hospital emergency room and operating room where the defendant had received medical treatment.

State v. Allen, 200 Wis. 2d 301, 309, 546 N.W.2d 517 (Ct. App. 1996).

Both Wis. Stat. § 146.82, concerning patient health-care records, and Wis. Stat. § 905.04, concerning communications between a patient and the patient's health-care provider, address the confidential or privileged status of health-care information. Consequently, the two statutes are read in pari materia, and the courts will avoid a conflict between the two if such a construction is reasonable.

Steinberg v. Jensen, 194 Wis. 2d 439, 472–73, 534 N.W.2d 361 (1995).

The Wis. Stat. § 905.04 privilege is a testimonial rule of evidence, not a substantive rule of law, and therefore does not apply outside judicial proceedings. Defense counsel can engage in limited ex parte communications with a plaintiff's treating physicians, because such communications occur outside a judicial proceeding and are not governed by Wis. Stat. § 905.04, as long as the communications do not involve the discussion of confidential information. However, in so communicating, a defense lawyer must (1) inform the physician at the beginning that the physician can decline to speak, (2) warn that the conversation must be limited to nonconfidential matters, (3) instruct the physician not to disclose anything that might be confidential, and (4) take steps to ensure that the conversation does not stray into confidential information.

Treating physicians can communicate with each other regarding the plaintiff's treatment or condition, subject to the physician's ethical duty of confidentiality.

State v. Speese, 191 Wis. 2d 205, 217, 221, 528 N.W.2d 63 (Ct. App. 1995), *rev'd on other grounds*, 199 Wis. 2d 597, 545 N.W.2d 510 (1996).

A patient cannot be unilaterally deprived of the privilege against disclosure of confidential communications by a third party's unpermitted access to medical records. A patient possesses an absolute right under Wis. Stat. § 905.04(2) to prevent disclosure.

In a criminal proceeding, however, if a defendant makes a preliminary showing that access to a patient's privileged records might be necessary to a fair determination of guilt or innocence, the defendant is entitled to an *in camera* inspection of the records. If the witness possessing the privilege refuses to consent to such an inspection, the court should suppress the witness's testimony.

State v. Migliorino, 170 Wis. 2d 576, 588, 489 N.W.2d 678 (Ct. App. 1992).

A patient's mere physical presence in a physician's office is not within the ambit of the physician-patient privilege unless divulging the fact of consultation would also disclose the confidential communications made or information obtained or disseminated for purposes of diagnosis or

treatment.

State v. S.H., 159 Wis. 2d 730, 736, 465 N.W.2d 238 (Ct. App. 1990).

The physician-patient privilege extends to a child's communication with the child's social worker who is treating the child under the direction of a licensed psychologist.

Authors' Note. While this statement remains good law, the supreme court, in *State v. Johnson*, 2023 WI 39, ¶ 1 n.3, 407 Wis. 2d 195, 990 N.W.2d 174, held that, to the extent *S.H.* and other cases "can be read to permit in camera review of privately held, privileged health records in a criminal case upon a showing of materiality," that holding was expressly overruled.

State v. Kennedy, 134 Wis. 2d 308, 320–21, 396 N.W.2d 765 (Ct. App. 1986).

Evidence that is privileged under the local law of the state that has the most significant relationship with the communication, but which is not privileged under the local law of the forum, will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.

State v. Henry, 111 Wis. 2d 650, 654–57, 332 N.W.2d 88 (Ct. App. 1983).

The physician-patient privilege does not apply in a situation in which a blood test is ordered by a police officer, because the test is not prescribed by a "health care provider" and the driver is not a "patient." Wis. Stat. §§ 146.81 and 146.82 do not prohibit the disclosure of tests to law enforcement officials once the driver has consented to the taking of the test.

State ex rel. Pflaum v. Psychology Examining Bd., 111 Wis. 2d 643, 645, 331 N.W.2d 614 (Ct. App. 1983).

The privilege does not apply to a person submitting to an examination for scientific purposes.

State v. Hungerford, 84 Wis. 2d 236, 241–42, 267 N.W.2d 258 (1978).

A person treated while under commitment for sex crimes cannot prevent treating physicians from testifying by invoking the privilege. The exemption from the privilege for hospitalization proceedings relates not to the type of relationship between the patient and physician, but to a particular type of proceeding.

(3) Who May Claim the Privilege

State v. S.H., 159 Wis. 2d 730, 736, 465 N.W.2d 238 (Ct. App. 1990).

A guardian ad litem has the authority to claim the privilege on behalf of the ward.

Authors' Note. While this statement remains good law, the supreme court in *State v. Johnson*, 2023 WI 39, ¶ 1 n.3, 407 Wis. 2d 195, 990 N.W.2d 174, held that to the extent *S.H.* and other cases "can be read to permit in camera review of privately held, privileged health records in a criminal case upon a showing of materiality," that holding was expressly overruled.

State v. Echols, 152 Wis. 2d 725, 737–38, 449 N.W.2d 320 (Ct. App. 1989).

The privilege must be claimed on the patient's behalf and only by those specifically authorized to do so by Wis. Stat. § 905.04(3). Unless specifically authorized by the rule to claim the privilege on the patient's behalf, a party has no standing to complain that the testimony or other evidence will violate another person's privilege.

(4) Exceptions

Johnson v. Rogers Mem'l Hosp., Inc., 2005 WI 114, ¶¶ 53–78, 283 Wis. 2d 384, 700 N.W.2d 27.

A third-party action by parents against their adult daughter's unlicensed therapist, for emotional harm based on negligent treatment, was impeded by the daughter's refusal to waive the therapist-patient privilege. While the patient's communications with the therapist were privileged because the patient had a reasonable expectation of confidentiality and the therapist worked under the direction of a physician, there is a public policy exception to the therapist-patient privilege, and to the confidentiality in patient health-care records, when negligent therapy causes false accusations against the parents for sexually or physically abusing their child. The exception is not unlimited and is implicated only when the plaintiff can establish a reasonable likelihood that negligent therapy occurred and the trial court, after conducting an *in camera* review, agrees that the records contain relevant information regarding negligent treatment.

State v. Agacki, 226 Wis. 2d 349, 363, 595 N.W.2d 31 (Ct. App. 1999).

A patient's disclosure to a psychotherapist that the patient had a gun, which the patient might use to injure himself or others, was not privileged. It fell within the dangerous-patient exception and thus was not subject to a motion to suppress when a police officer used that statement as a basis to search the patient.

State v. Allen, 200 Wis. 2d 301, 310–11, 546 N.W.2d 517 (Ct. App. 1996).

Medical billing records, to the extent that they are needed for "billing, collection or payment of claims" pursuant to Wis. Stat. § 146.82(2)(a)3., are not privileged, even though Wis. Stat. § 905.04(4) does not contain a provision excluding medical billing records from the scope of privileged communications. The two statutes are read in pari materia; they collectively represent the limits of confidentiality which attach to medical records.

Authors' Note. The physician-patient privilege does not apply to worker's compensation proceedings. Wis. Stat. § 102.13(1), (2). Any treating physician can be consulted or called by any party to give testimony concerning the injury or disease, with or without the patient's consent.

(a) Proceedings for Commitment, Guardianship, Protective Services, or Protective Placement

State v. Zanelli, 212 Wis. 2d 358, 376, 569 N.W.2d 301 (Ct. App. 1997).

The physician-patient privilege is subject to this exception in civil commitment hearings pursuant to Wis. Stat. ch. 980, the so-called sexual predator law.

State v. Joseph P. (In re Joy P.), 200 Wis. 2d 227, 234–36, 546 N.W.2d 494 (Ct. App. 1996).

The Wisconsin privilege concerning communications between a patient and a health-care provider does not provide an exception allowing disclosure of otherwise-privileged communications by an individual evaluated during incarceration when the individual had an "objectively reasonable" belief the discussions were "confidential" and made for the "purposes of diagnosis or treatment." The court held that the trial court's reliance on *State v. Hungerford*, 84 Wis. 2d 236, 240–42, 267 N.W.2d 258, 261–62 (1978), was misplaced.

See also ....

State v. Post, 197 Wis. 2d 279, 332–33, 541 N.W.2d 115 (1995) (holding that physician-patient privilege is subject to exception for hearings under Wis. Stat. ch. 980).

(b) Examination by Order of Judge

Ranft v. Lyons, 163 Wis. 2d 282, 294, 471 N.W.2d 254 (Ct. App. 1991).

Wis. Stat. § 804.10 permits a trial court to order a physical examination when the party's physical condition is in issue, irrespective of which party has placed the condition in issue.

When the court orders an examination pursuant to Wis. Stat. § 804.10, the physician-patient privilege does not apply.

(c) Condition an Element of Claim or Defense

Seltrect v. Bremer, 195 Wis. 2d 880, 889, 536 N.W.2d 727 (Ct. App. 1995).

A plaintiff in a personal injury action cannot be compelled to consent to unlimited ex parte communications between the opposing counsel and the plaintiff's treating physician. Discovery authorizations must be tailored to exclude confidential information from disclosure and to limit disclosure to information that is relevant to the plaintiff's claim.

Steinberg v. Jensen, 194 Wis. 2d 439, 468, 534 N.W.2d 361 (1995).

Defense counsel cannot engage in ex parte "discovery" with a plaintiff's treating physicians, but the privilege does not prohibit defense counsel from engaging in ex parte communications with the treating physicians as long as the communication does not present a risk of disclosing confidential information, and as long as the physician is not a party to the lawsuit and represented by counsel.

Whether confidential information is actually disclosed does not determine whether a violation has occurred. The rule recognizes the concern that privileged information could be disclosed.

Authors' Note. *State ex rel. Klieger v. Alby*, 125 Wis. 2d 468, 373 N.W.2d 57 (Ct. App. 1985), is overruled.

Ranft v. Lyons, 163 Wis. 2d 282, 291, 471 N.W.2d 254 (Ct. App. 1991).

In a negligence action seeking punitive damages, the defendant driver's hospital records pertaining to an alcohol evaluation were not protected by the physician-patient privilege. The defendant made physical condition an element of the defense by testifying in a deposition that the defendant neither felt impaired nor exhibited any signs of impairment, despite admitting negligence and police tests that revealed a .18% blood alcohol concentration at the time of the accident. The deposition testimony supported two elements of the defendant's defense: that the defendant was not liable for punitive damages; and that the plaintiffs were contributorily negligent, thus requiring a jury determination of contributory negligence.

State v. Taylor, 142 Wis. 2d 36, 40–41, 417 N.W.2d 192 (Ct. App. 1987).

When a defendant relies on a mental condition as an element of a defense, the defendant waives the physician-patient privilege. As a result, the defendant also loses the confidentiality of the defendant's treatment records under Wis. Stat. § 51.30.

(d) Homicide Trials

State v. Kennedy, 134 Wis. 2d 308, 321, 396 N.W.2d 765 (Ct. App. 1986).

Evidence of a blood test taken in Minnesota, which was privileged under Minnesota law, was admissible in a homicide case in Wisconsin under the Wis. Stat. § 905.04(4)(d) exception to the physician-patient privilege.

State v. Jenkins, 80 Wis. 2d 426, 434–35, 259 N.W.2d 109 (1977).

In a homicide trial, a defendant cannot invoke the privilege to prevent a doctor who has taken a blood test solely for diagnostic purposes, and not at the request of any governmental agency, from testifying regarding the result of the blood test.

Johnson v. State, 75 Wis. 2d 344, 359–60, 249 N.W.2d 593 (1977).

The "homicide trials" exception to the privilege only relates to facts that are circumstances with respect to the homicide. Therefore, an independent witness who testifies in a homicide case can invoke the privilege with regard to the witness's own medical condition, since it has nothing to do with the circumstances regarding the homicide.

(e) Abused or Neglected Child or Abused Unborn Child

State v. Denis L.R., 2005 WI 110, 283 Wis. 2d 358, 699 N.W.2d 154.

A three-year-old girl, while undergoing counseling, reported that the girl's grandfather had sexually assaulted her. The director of the counseling clinic reported the sexual abuse to the authorities, as required by Wis. Stat. § 48.981(3)(a). As a result of that report, the therapist-patient privilege was extinguished: an examination of the victim had created a reasonable ground for her counselor to form an opinion that the girl had been abused and that the abuse was other than accidentally caused or inflicted by another within the meaning of the exception to the privilege under the former Wis. Stat. § 905.04(4)(e)2.

Authors' Note. Since *State v. Denis L.R.* was decided, the Wisconsin Legislature has repealed Wis. Stat. § 905.04(4)(e)2. and replaced it with Wis. Stat. § 905.04(4)(e)2m. *See* 2007 Wis. Act 53. Although differently worded, Wis. Stat. § 905.04(4)(e)2m. continues to provide an exception for a report of child abuse or neglect under Wis. Stat. § 48.981(3).

(f) Tests for Intoxication

State v. Straehler, 2008 WI App 14, ¶ 14, 307 Wis. 2d 360, 745 N.W.2d 431.

In this criminal case involving suppression of chemical tests for intoxication, the health-care privacy protections of the federal Health Insurance Portability and Accountability Act (HIPAA) did not preempt the Wis. Stat. § 905.04(4)(f) exception to the patient privilege.

City of Muskego v. Godec, 167 Wis. 2d 536, 545–46, 482 N.W.2d 79 (1992).

There is no privilege concerning the results of chemical tests for intoxication or blood alcohol concentration. Wis. Stat. § 146.82, a general statute concerning the confidentiality of patient health-care records, does not apply because the more specific statute (here, Wis. Stat. § 905.04(4)(f)) takes precedence in such a situation.

(g) Paternity Proceedings

Family Planning Health Servs. v. T.G. (In re Paternity of J.S.P.), 158 Wis. 2d 100, 110, 461 N.W.2d 794 (Ct. App. 1990).

Trial courts are not allowed unfettered discretion under Wis. Stat. § 905.04(4)(g) to allow discovery of information otherwise privileged under the physician-patient privilege. In a paternity case, a family-planning clinic patient's medical history was discoverable as long as evidence relating to the patient's sexual relations outside the probable time of conception was eliminated.

905.045 Domestic violence or sexual assault advocate-victim privilege.

(1) DEFINITIONS. In this section:

(a) "Abusive conduct" means abuse, as defined in s. 813.122(1)(a), of a child, as defined in s. 813.122(1)(b), interspousal battery, as described under s. 940.19 or 940.20(1m), domestic abuse, as defined in s. 813.12(1)(am), sexual exploitation by a therapist under

s. 940.22, sexual assault under s. 940.225, human trafficking involving a commercial sex act under s. 940.302, or child sexual abuse under s. 948.02, 948.025, or 948.05 to 948.11.

(c) A communication or information is "confidential" if not intended to be disclosed to 3rd persons other than persons present to further the interest of the person receiving counseling, assistance, or support services, persons reasonably necessary for the transmission of the communication or information, and persons who are participating in providing counseling, assistance, or support services under the direction of a victim advocate, including family members of the person receiving counseling, assistance, or support services and members of any group of individuals with whom the person receives counseling, assistance, or support services.

(d) "Victim" means an individual who has been the subject of abusive conduct or who alleges that he or she has been the subject of abusive conduct. It is immaterial that the abusive conduct has not been reported to any government agency.

(e) "Victim advocate" means an individual who is an employee of or a volunteer for an organization the purpose of which is to provide counseling, assistance, or support services free of charge to a victim.

(2) General rule of privilege. A victim has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated among the victim, a victim advocate who is acting in the scope of his or her duties as a victim advocate, and persons who are participating in providing counseling, assistance, or support services under the direction of a victim advocate, if the communication was made or the information was obtained or disseminated for the purpose of providing counseling, assistance, or support services to the victim.

(3) Who may claim the privilege. The privilege may be claimed by the victim, by the victim's guardian or conservator, or by the victim's personal representative if the victim is deceased. The victim advocate may claim the privilege on behalf of the victim. The victim advocate's authority to do so is presumed in the absence of evidence to the contrary.

(4) Exceptions. Subsection (2) does not apply to any report concerning child abuse that a victim advocate is required to make under s. 48.981 or concerning a threat of violence in or targeted at a school that a victim advocate is required to make under s. 175.32.

(5) Relationship to s. 905.04. If a communication or information that is privileged under sub. (2) is also a communication or information that is privileged under s. 905.04(2), the provisions of s. 905.04 supersede this section with respect to that communication or information.

Chapter 15
Husband-Wife and Domestic Partner Privilege

905.05 Husband-wife and domestic partner privilege.

(1) General rule of privilege. A person has a privilege to prevent the person's spouse or former spouse or domestic partner or former domestic partner from testifying against the person as to any private communication by one to the other made during their marriage or domestic partnership. As used in this section, "domestic partner" means a domestic partner under ch. 770.

(2) Who may claim the privilege. The privilege may be claimed by the person or by the spouse or domestic partner on the person's behalf. The authority of the spouse or domestic partner to do so is presumed in the absence of evidence to the contrary.

(3) Exceptions. There is no privilege under this rule:

(a) If both spouses or former spouses or domestic partners or former domestic partners are parties to the action.

(b) In proceedings in which one spouse or former spouse or domestic partner or former domestic partner is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a 3rd person

committed in the course of committing a crime against the other.

(c) In proceedings in which a spouse or former spouse or domestic partner or former domestic partner is charged with a crime of pandering or prostitution.

(d) If one spouse or former spouse or domestic partner or former domestic partner has acted as the agent of the other and the private communication relates to matters within the scope of the agency.

Judicial Council Committee's Note (1974)

Sub. (1). This section is generally a restatement of s. 885.18, which is repealed, and is a substantial departure from the proposed Federal Rule. The principal differences are: (1) this section applies to civil and criminal actions; (2) this section continues the former statute applicability to private communications made during the marriage; (3) this section applies the privilege to such communications although the marriage has been terminated.

Sub. (2). The Federal Rule is adopted. Wisconsin is in accord, s. 885.21.

Sub. (3). Exception (a) prevents the exercise of a privilege to defeat interspousal rights. Exception (b) follows the proposed Federal Rule. The second exception to the proposed Federal Rule is omitted as unnecessary because of subsection (1). Exception (c) is consistent with the third exception to the proposed Federal Rule. Exception (d) follows the present Wisconsin statute.

Case Annotations

(1) General Rule of Privilege

Umhoefer v. Police & Fire Comm'n, 2002 WI App 217, ¶¶ 14–18, 257 Wis. 2d 539, 652 N.W.2d 412.

One spouse testifying against the other may not invoke the spousal privilege to refuse to answer the cross-examination questions of the other spouse. The spousal privilege belongs only to the spouse against whom testimony is being offered.

Muetze v. State, 73 Wis. 2d 117, 124–25, 129–30, 243 N.W.2d 393 (1976).

Private communications are not limited to oral or written exchanges but may also include expressive acts that are intended to convey information of a privileged character.

A communication that is privileged when made remains so regardless of unauthorized out-of-court disclosure. The status (separation or estrangement) of a particular marital relationship has no bearing on whether a privilege exists for marital communications.

Unauthorized out-of-court disclosure of private marital communications may not be used in a proceeding before a magistrate to obtain a search warrant.

(2) Who May Claim the Privilege

(3) Exceptions

State v. Eison, 2011 WI App 52, ¶¶ 28, 31, 332 Wis. 2d 331, 797 N.W.2d 890.

A criminal defendant's act of ringing the doorbell at his and his wife's home was not privileged because it was not a private communication between spouses. The act was communicated to anyone who might hear the doorbell and was admissible to prove the defendant's whereabouts.

The defendant's false statement to his wife that he was not being paid by his employer was subject to the marital privilege. Untruthfulness does not preclude the exercise of the privilege. However, the wife's independent discovery that he was being paid by his employer was not privileged because that was not a private communication between spouses.

State v. Richard G.B., 2003 WI App 13, ¶¶ 10–17, 259 Wis. 2d 730, 656 N.W.2d 469.

In a proceeding for sexual assault of a child, one spouse was permitted to testify to otherwise-privileged communications from the other pursuant to the "third-party exception" to the spousal privilege. This exception provides that no privilege exists in proceedings in which one spouse is charged with a crime against the person or property of a third person committed in the course of committing a crime against the other. The exception was applicable here because, by committing the offense of sexual assault of a child, the defendant spouse was also committing the crime of adultery against his wife. For purposes of the third-party exception, it is irrelevant whether the acts of the defendant that constitute a crime against a third party are the same acts that constitute a crime against the spouse or different acts.

State v. Michels, 141 Wis. 2d 81, 94, 414 N.W.2d 311 (Ct. App. 1987).

A foster child is properly included within the "child of either" category stated in Wis. Stat. § 905.05(3).

State v. Doney, 114 Wis. 2d 309, 312, 338 N.W.2d 852 (Ct. App. 1983).

When both spouses are substantial participants in patently illegal activities, the marital privilege does not extend to protect either spouse from the testimony of the other. Moreover, this section does not recognize the technical distinctions between principal and agent, business partners, or co-conspirators. A co-conspirator is an agent in a criminal venture. Persons who enter a conspiracy become agents for one another.

State v. Dalton, 98 Wis. 2d 725, 732–33, 298 N.W.2d 398 (Ct. App. 1980).

If the holder of the privilege later discloses the confidential communication to other persons, then the privilege is waived and the person's spouse may testify.

State v. Sarinske, 91 Wis. 2d 14, 42–43, 280 N.W.2d 725 (1979), *overruled on other grounds by State v. Wayerski*, 2019 WI 11, 385 Wis. 2d 344, 922 N.W.2d 468.

The defendant's act of tearing a phone off the wall in front of his wife was held not to be "primarily communicative" but was an attempt to stop his wife from calling for assistance.

Chapter 16
Communications to Members of the Clergy

905.06 Communications to members of the clergy.

(1) DEFINITIONS. As used in this section:

(a) A "member of the clergy" is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting the individual.

(b) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(2) GENERAL RULE OF PRIVILEGE. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in the member's professional character as a spiritual adviser.

(3) WHO MAY CLAIM THE PRIVILEGE. The privilege may be claimed by the person, by the person's guardian or conservator, or by the person's personal representative if the person is deceased. The member of the clergy may claim the privilege on behalf of the person. The member of the clergy's authority so to do is presumed in the absence of evidence to the contrary.

(4) EXCEPTIONS. There is no privilege under this section concerning observations or information that a member of the clergy, as defined in s. 48.981(1)(cx), is required to report as suspected or threatened child abuse under s. 48.981(2)(bm) or as a threat of violence in or targeted at a school under s. 175.32.

Judicial Council Committee's Note (1974)

This section is the Proposed Federal Rule adopted without any alterations or amendments. It represents a departure from the present s. 885.20, which is repealed.

(1) Definitions

(a) Wisconsin is not in accord. Section 885.20 (1969) would not recognize "an individual reasonably believed so to be" a clergyman.

(b) There is no counterpart in s. 885.20 (1969) since Wisconsin's privilege was extended to confessions only.

(2) Wisconsin is not in accord. Section 885.20 is limited to a confession whereas the proposed section enlarges the privilege to a confidential communication.

(3) Section 885.20 provides the right of the person to claim the privilege, but is silent as to whether anyone else can claim the privilege on his behalf.

Case Annotations

State v. Kunkel, 137 Wis. 2d 172, 193–95, 404 N.W.2d 69 (Ct. App. 1987).

The clergy privilege is inapplicable to out-of-court disclosures by a priest to the police. This privilege does not apply to communications made outside a judicial proceeding, because it is a rule of evidence. It is only when the communications themselves are sought to be admitted into evidence in a judicial proceeding that the rule of exclusion applies.

Chapter 17
Miscellaneous Privileges

905.065 Honesty testing devices.

(1) DEFINITION. In this section, "honesty testing device" means a polygraph, voice stress analysis, psychological stress evaluator or any other similar test purporting to test honesty.

(2) GENERAL RULE OF THE PRIVILEGE. A person has a privilege to refuse to disclose and to prevent another from disclosing any oral or written communications during or any results of an examination using an honesty testing device in which the person was the test subject.

(3) WHO MAY CLAIM PRIVILEGE. The privilege may be claimed by the person, by the person's guardian or conservator or by the person's personal representative, if the person is deceased.

(4) EXCEPTION. There is no privilege under this section if there is a valid and voluntary written agreement between the test subject and the person administering the test.

Case Annotations

State v. Vice, 2021 WI 63, ¶¶ 23–37, 397 Wis. 2d 682, 961 N.W.2d 1.

Admissibility of statements made during a post-polygraph interview is determined by a two-part test. *See State v. Davis*, 2008 WI 71, 310 Wis. 2d 583, 751 N.W.2d 332. First, the interview must be discrete from the polygraph examination. The record here showed the polygraph and the interview were separate events. Second, the statement must be voluntary. The court in *Vice* concluded that the statement was not impermissibly coerced despite the officers' repeated references to the polygraph results; their assertions that the defendant remembered the assault even though he claimed he did not; their failure to correct the defendant when he said he must have assaulted the victim because the polygraph results said he did; and their failure to inform the defendant that the polygraph results were inadmissible in court.

State v. Davis, 2008 WI 71, ¶¶ 19–23, 310 Wis. 2d 583, 751 N.W.2d 332.

Statements made during honesty testing examinations, such as a voice stress analysis, are not admissible. Statements that are voluntarily given at an interview that is totally discrete from the honesty testing examination are admissible.

Whether a statement was made during a part of the test or at a totally discrete event is largely dependent on whether the test was over when the statement was given. The following factors should also be weighed and considered:

1. Whether the defendant was told the test was over;
2. Whether any time passed between the analysis and the defendant's statement;
3. Whether the officer conducting the analysis was different from the officer who took the statement;
4. Whether the location when the analysis was conducted differed from where the statement was given; and
5. Whether the analysis was referred to in obtaining a statement from the defendant.

905.07 Political vote.

Every person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

Judicial Council Committee's Note (1974)

Wisconsin is in accord. *State ex rel. Doerflinger v. Hilmantel*, 23 Wis. 422 (1868).

Case Annotations

Carlson v. Oconto Cnty. Bd. of Canvassers, 2001 WI App 20, ¶ 16, 240 Wis. 2d 438, 623 N.W.2d 195.

In a proceeding following an election recount, neither of two voters who lived outside the election district was entitled to the Wis. Stat. § 905.07 privilege against disclosing how each voted, because both votes were cast illegally.

905.08 Trade secrets.

A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret as defined in s. 134.90(1)(c), owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

Comments (1985 Act 236)

Wisconsin law currently provides that a person has a privilege to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, under certain circumstances. This amendment defines the term "trade secret", as used in the current statutes relating to the trade secret evidentiary privilege, by cross-reference to the definition in this bill in s. 134.90(1)(c).

Judicial Council Committee's Note (1974)

Wisconsin does not have a comparable statutory privilege although s. 943.205 establishes a crime for the disclosure of a trade secret. Case law recognizes a cause of action for damages for the misappropriation of trade secrets. *Forest Laboratories, Inc. v. Formulations, Inc.*, 299 F. Supp. 202 (1969), *affirmed in part, reversed in part* 452 F.2d 621; *Besley-Welles Corp. v. Balax, Inc.*, 291 F. Supp. 328 (1968), *affirmed in part, reversed in part Bendix Corp. v. Balax, Inc.*, 421 F.2d 809, *certiorari denied* 399 U.S. 911, 90 S. Ct. 2203, 26 L. Ed.2d 562, *on remand* 321 F. Supp. 1095, *reversed* 471 F.2d 149; *Bendix Corp. v. Balax, Inc.*, 421 F.2d 809 (1970), *certiorari denied* 399 U.S. 911, 90 S. Ct. 2203, 26 L. Ed.2d 562, *on remand* 321 F. Supp. 1095, *reversed* 471 F.2d 149; *Abbott Laboratories v. Norse Chem. Corp.*, 33 Wis. 2d 445, 147 N.W.2d 529 (1967).

Case Annotations

Wisconsin Elec. Power Co. v. Public Serv. Comm'n, 106 Wis. 2d 142, 147–49, 316 N.W.2d 120 (Ct. App. 1981), *aff'd*, 110 Wis. 2d 530, 329 N.W.2d 178 (1983).

The court discussed the definition of a trade secret.

905.09 Law enforcement records.

The federal government or a state or a subdivision thereof has a privilege to refuse to disclose investigatory files, reports and returns for law enforcement purposes except to the extent available by law to a person other than the federal government, a state or subdivision thereof. The privilege may be claimed by an appropriate representative of the federal government, a state or a subdivision thereof.

Judicial Council Committee's Note (1974)

This section has no direct parallel in the proposed Federal Rule 509. A privilege for law enforcement files and records is established by this section. However, the privilege is qualified by the phrase "to the extent available by law" to preserve the supremacy of s. 19.21 permitting examination of public records and documents. The burden is upon the person claiming the privilege to establish in a judicial determination that

the public interest outweighs the right of a member of the public to have access to claimed privileged material in the fashion prescribed in *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 137 N.W.2d 470, *modified and rehearing denied* 28 Wis. 2d 672, 139 N.W.2d 241 (1965), and *Beckon v. Emery*, 36 Wis. 2d 510, 153 N.W.2d 501 (1967). Normally, the "appropriate representative" to make the claim will be counsel; however, it is possible that disclosure of the privileged material will be sought in proceedings to which the government, state or subdivision, as the case may be, is not a party. Under these circumstances, effective implementation of the privilege requires that other representatives be considered "appropriate."

Authors' Note. *See* Wis. Stat. § 165.55(8) (state fire marshal, at own discretion, has privilege not to testify regarding any investigations that fire marshal has made). *But see Black v. General Elec. Co.*, 89 Wis. 2d 195, 278 N.W.2d 224 (1979).

905.095 Peer support and critical incident stress management services communications.

(1) DEFINITIONS. In this section:

(a) "Communication" has the meaning given in s. 165.875 (1) (c).

(b) "Critical incident stress management services" has the meaning given in s. 165.875 (1) (f).

(c) "Critical incident stress management services team member" has the meaning given under s. 165.875 (1) (g).

(d) "Peer support services" has the meaning given in s. 165.875 (1) (p).

(e) "Peer support team member" means a person who is designated as a peer support team member under s. 165.875 (1) (q).

(2) GENERAL RULE OF PRIVILEGE. A person receiving peer support services from a peer support team member or a person receiving critical incident stress management services from a critical incident stress management services team member has a privilege during the person's life to refuse to disclose and to prevent any other person from disclosing peer support communications or critical incident stress management services communications, including communications made during or arising out of individual or group support sessions.

(3) WHO MAY CLAIM THE PRIVILEGE. The privilege under this section may be claimed by the person who received the peer support services or critical incident stress management services or the guardian or conservator of the person who received the peer support services or critical incident stress management services. A person who was a peer support team member or critical incident stress management services team member at the time of the communication is presumed to have authority during the life of the person who received the peer support services or critical incident stress management services to claim the privilege on behalf of the person who received the peer support services or critical incident stress management services.

(4) EXCEPTIONS. (a) No privilege exists under this section for any of the following:

1. Communication to a peer support team member or critical incident stress management services team member that is evidence of actual or suspected child neglect or abuse.

2. Communication to a peer support team member or critical incident stress management services team member that is evidence a person receiving peer support services or critical incident stress management services is a clear and immediate danger to himself or herself or others.

3. Communication to a peer support team member or critical incident stress management services team member that is evidence that a person who is receiving the peer support services or critical incident stress management services has committed a crime, plans to commit a crime, or intends to conceal a crime.

(b) A person receiving peer support or critical incident stress management services whose communications are privileged under this section may waive the privilege in writing.

905.10 Identity of informer.

(1) Rule of privilege. The federal government or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(2) Who may claim. The privilege may be claimed by an appropriate representative of the federal government, regardless of whether the information was furnished to an officer of the government or of a state or subdivision thereof. The privilege may be claimed by an appropriate representative of a state or subdivision if the information was furnished to an officer thereof.

(3) Exceptions.

(a) *Voluntary disclosure; informer a witness*. No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the informer's communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the federal government or a state or subdivision thereof.

(b) *Testimony on merits*. If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the federal government or a state or subdivision thereof is a party, and the federal government or a state or subdivision thereof invokes the privilege, the judge shall give the federal government or a state or subdivision thereof an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits but the judge may direct that testimony be taken if the judge finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the federal government or a state or subdivision thereof elects not to disclose the informer's identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on the judge's own motion. In civil cases, the judge may make an order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the federal government, state or subdivision thereof. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera at which no counsel or party shall be permitted to be present.

(c) *Legality of obtaining evidence*. If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, the judge may require the identity of the informer to be disclosed. The judge shall on request of the federal government, state or subdivision thereof, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure in camera at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the appropriate federal government, state or subdivision thereof.

Judicial Council Committee's Note (1974)

Sub. (1). There is no comparable Wisconsin statute. Insofar as criminal investigation by a law enforcement officer is concerned, Wisconsin case law recognizes that the identity of an informer need not always be disclosed. *Stelloh v. Liban*, 21 Wis. 2d 119, 124 N.W.2d 101 (1963); *State v. Midell*, 40 Wis. 2d 516, 162 N.W.2d 54 (1968).

The rule, however, seems to broaden the application of the existing privilege in Wisconsin in that it is extended to a member or staff of a legislative committee.

Sub. (2). The Proposed Federal Rule 510(b) was altered to apply to Wisconsin. It is intended to recognize the privilege of a representative of the federal government and of other states as well as Wisconsin, as it involves a situation that would be likely to occur in state courts.

Sub. (3)(a). Wisconsin is in accord; *Stelloh v. Liban*, 21 Wis. 2d 119, 124 N.W.2d 101 (1963).

(b). This alters the present Wisconsin law which has not granted to the court the right to dismiss the proceedings. The court could require disclosure if it is essential to assure a fair determination of the issues. *Stelloh v. Liban*, 21 Wis. 2d 119, 124 N.W.2d 101 (1963); *State v. Midell*, 40

Wis. 2d 516, 162 N.W.2d 54 (1968).

In civil cases, Wisconsin is in accord: *Stelloh v. Liban*, 21 Wis. 2d 119, 124 N.W.2d 101 (1963); *State v. Midell*, 40 Wis. 2d 516, 162 N.W.2d 54 (1968).

(c). The procedure set forth in the Federal Rule has not been mandatory in Wisconsin; however, since the question of disclosure is within the sound discretion of the trial court, the same procedure could be required, if the court desired. *Stelloh v. Liban*, 21 Wis. 2d 119, 124 N.W.2d 101 (1963); *State v. Midell*, 40 Wis. 2d 516, 162 N.W.2d 54 (1968).

Case Annotations

State v. Nellessen, 2014 WI 84, ¶¶ 2, 25, 34, 360 Wis. 2d 493, 849 N.W.2d 654.

To trigger an *in camera* review under Wis. Stat. § 905.10(3)(b), a defendant seeking disclosure of an informer's identity must show a reasonable possibility, grounded in the facts and circumstances of the case, that a confidential informer may have information necessary to the defendant's theory of defense.

In this case, the defendant was the driver of a car in which the police found a pound of marijuana that one of the defendant's passengers had placed in the trunk. The police stopped the car based on a tip from a confidential informer that marijuana was in the car. The defendant denied knowledge. The circuit court properly denied an *in camera* review because the defendant failed to sufficiently articulate why or how the informer would have any knowledge of what the defendant knew or did not know about the marijuana in the car.

State v. Vanmanivong, 2003 WI 41, ¶¶ 24, 32–34, 261 Wis. 2d 202, 661 N.W.2d 76.

A defendant must show that an informant's testimony is necessary to the defense before a court may require disclosure under Wis. Stat. § 905.10(3)(b). "Necessary" means that the evidence must support an asserted defense to the degree that the evidence could create reasonable doubt.

In determining whether an informant's identity should be disclosed, once a defendant has made an initial showing that there is a reasonable probability that an informant may be able to give testimony necessary to the fair determination of guilt or innocence, the court must give the state the opportunity to show, *in camera*, facts relevant to determining whether the informant can, in fact, provide such testimony. If, and only if, the court determines that an informant's testimony is necessary to the defense, in that it could create a reasonable doubt of the defendant's guilt in the jurors' minds, must the privilege give way.

It is error for a court to rely on an unsworn memo or independently request additional information from law enforcement when deciding whether to disclose an informant's identity.

State v. Norfleet, 2002 WI App 140, ¶¶ 10–16, 254 Wis. 2d 569, 647 N.W.2d 341.

A court is not required to undertake an *in camera* review of facts relevant to determining whether an informer can supply testimony necessary to a fair determination of the issue of guilt or innocence when the defendant has already shown that the informer's testimony is critical to the defendant's fair trial. In these circumstances, the only function of conducting an *in camera* hearing would be to determine the credibility of the informer, and this would usurp the function of the jury.

State v. Lass, 194 Wis. 2d 591, 598–99, 535 N.W.2d 904 (Ct. App. 1995).

The death of an informer does not waive the privilege protecting the informer's identity, because the state is the holder of the privilege and because disclosure of the informer's identity could put the informer's family in the type of jeopardy that this privilege was designed to prevent.

State v. Gerard, 180 Wis. 2d 327, 336–41, 509 N.W.2d 112 (Ct. App. 1993), *rev'd on other grounds*, 189 Wis. 2d 505, 525 N.W.2d 718 (1995).

The trial court erred by not ordering the disclosure of an informer's identity when the information would have supported the defense theory. The test of the necessity of the testimony is whether it could create in the jurors' minds a reasonable doubt of the defendant's guilt.

The informer need not testify at the *in camera* hearing required to determine whether the informer's testimony is necessary for a fair determination of guilt or innocence.

Mayfair Chrysler-Plymouth, Inc. v. Baldarotta, 162 Wis. 2d 142, 167, 469 N.W.2d 638 (1991).

Governmental agencies that are engaged in a law enforcement function may refuse to disclose portions of records that would reveal the names of confidential informants who have been given a valid pledge of confidentiality. When criminal or noncriminal law enforcement interests are at stake, the need to maintain the integrity of the government's pledges of confidentiality to informants may outweigh the public's interest in having access to portions of records that could identify a confidential informant.

State v. Gordon, 159 Wis. 2d 335, 347, 464 N.W.2d 91 (Ct. App. 1990).

The informer privilege protects the contents of a communication that will tend to reveal the informer's identity.

State v. Hargrove, 159 Wis. 2d 69, 75, 469 N.W.2d 181 (Ct. App. 1990).

Before an informant's identity may be disclosed, the proponent of the disclosure has the initial, although minimal, burden of justifying the trial court's further inquiry by showing that the proposed testimony is necessary to support the theory of defense.

State v. Fischer, 147 Wis. 2d 694, 702–03, 433 N.W.2d 647 (Ct. App. 1988).

The burden on the defendant imposed by Wis. Stat. § 905.10(3)(c) for disclosure of an informer's identity is different from the burden imposed by Wis. Stat. § 905.10(3)(b). Wis. Stat. § 905.10(3)(b) imposes only a minimal burden on the defendant.

State v. Larsen, 141 Wis. 2d 412, 420, 415 N.W.2d 535 (Ct. App. 1987).

While the procedure in Wis. Stat. § 905.10(3) requires decision-making by the judge, the record must show that the judge's conclusions were reached by a reasoning process based on either the facts in the record or reasonable inferences from those facts.

State v. Doney, 114 Wis. 2d 309, 313, 338 N.W.2d 852 (Ct. App. 1983).

It was not error for the court to permit a witness to refuse to identify a person who had sold her marijuana when she was afraid to divulge his name. It was proper for the court to balance the witness's concern for her safety with the defendant's right to extract information he already had.

State v. Outlaw, 108 Wis. 2d 112, 126–27, 132, 321 N.W.2d 145 (1982).

In order to require a hearing under Wis. Stat. § 905.10(3)(b), the only showing the defendant need make is that there is a "possibility" that the informer could supply testimony necessary to a fair determination.

At a hearing under Wis. Stat. § 905.10, the question before the judge is whether there is a reasonable probability that the informer can give information necessary to a fair determination. The state has no burden other than to present evidence of what the informer will say.

The test the judge must use is whether the testimony the informer could give would be relevant and admissible in respect to an issue material to the accused individual's defense and reasonably necessary to a fair determination of guilt or innocence. It is not up to the trial judge to determine whether the testimony will, in fact, be helpful to the defendant.

905.11 Waiver of privilege by voluntary disclosure.

A person upon whom this chapter confers a privilege against disclosure of the confidential matter or communication waives the privilege if the person or his or her predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication.

Judicial Council Note (1993)

Subsection (2) is repealed because the rule of inadmissibility under s. 904.085 is not a privilege; it is waivable only if the parties stipulate that the mediator may investigate the parties under s. 767.11(14)(c).

Authors' Note. Wis. Stat. § 767.11(14)(c) has since been renumbered as Wis. Stat. § 767.405(14)(c). *See* 2005 Wis. Act 443 (eff. Jan. 1, 2007).

Judicial Council Committee's Note (1974)

Wisconsin is in accord. As to Attorney-Client privilege: s. 885.22; *State v. Dombrowski*, 44 Wis. 2d 486, 171 N.W.2d 349 (1969); *Foryan v. Firemen's Fund Ins. Co.*, 27 Wis. 2d 133, 133 N.W.2d 724 (1965).

As to Communication to Doctors: s. 885.21 (1969); *Cretney v. Woodman Accident Co.*, 196 Wis. 29, 219 N.W. 448, 62 A.L.R. 675 (1928); *Alexander v. Farmers Mut. Auto. Ins. Co.*, 25 Wis. 2d 623, 131 N.W.2d 373 (1964).

As to Husband-Wife: s. 885.18; *Grabowski v. State*, 126 Wis. 447, 105 N.W. 805 (1905).

Case Annotations

State v. Schmidt, 2016 WI App 45, ¶¶ 37–53, 370 Wis. 2d 139, 884 N.W.2d 510.

Wisconsin follows a broad rule with respect to waiver of privileges. In considering a waiver of the marital privilege, the court must measure the significance of any portion of a communication by the importance of its subject matter to the overall communication. If the importance of one portion of the communication is high relative to the overall communication, then the disclosure of that portion will serve as a waiver of the entire

communication. In this intentional-homicide prosecution, the court ruled that the defendant's disclosure to police that he wanted to kill himself waived his later-asserted privilege in a communication to his wife that he wanted to kill himself and one of the victims.

State v. Eison, 2011 WI App 52, ¶ 33, 332 Wis. 2d 331, 797 N.W.2d 890.

A criminal defendant waived his marital privilege by voluntary disclosure in telephone conversations with his wife from jail, because the communications were known to third parties. All outgoing telephone calls made by inmates of the jail were recorded, a policy disclosed to all inmates.

Harold Sampson Children's Tr. v. Linda Gale Sampson 1979 Tr., 2004 WI 57, ¶¶ 16–48, 271 Wis. 2d 610, 679 N.W.2d 794.

The plaintiffs' attorney, without the consent or knowledge of the plaintiffs, voluntarily produced confidential documents (which the attorney did not recognize as privileged) in response to the defendants' counsel's discovery request. This did not constitute a waiver of the attorney-client privilege under Wis. Stat. § 905.11, because only a client can waive this privilege in regard to attorney-client privileged documents.

Authors' Note. The Judicial Council note to Wisconsin Supreme Court Order 12-03, 2012 WI 114, 344 Wis. 2d xxi, adopting Wis. Stat. § 905.03(5) (forfeiture of lawyer-client privilege) effective January 1, 2013, stated that *Sampson*'s holding was not overruled. *See supra* ch. 13.

Borgwardt v. Redlin, 196 Wis. 2d 342, 356, 538 N.W.2d 581 (Ct. App. 1995).

A client's discovery request to see the client's file that is in the possession of current or former counsel does not waive the attorney-client privilege as to that file.

Daniel A. v. Walter H., 195 Wis. 2d 971, 995, 537 N.W.2d 103 (Ct. App. 1995).

By asserting an objection to a proposed deposition, on the ground that the deposition would be harmful to the defendant-ward's emotional condition, a guardian ad litem did not thereby waive the attorney-client privilege under the treatment records statute, Wis. Stat. § 51.30(4)(a).

State v. S.H., 159 Wis. 2d 730, 737, 465 N.W.2d 238 (Ct. App. 1990).

A physician's agent does not waive the physician-patient privilege by revealing parts of privileged communications when the patient has neither voluntarily disclosed the communication nor consented to waive the privilege.

Authors' Note. While this statement remains good law, the supreme court in *State v. Johnson*, 2023 WI 39, ¶ 1 n.3, 407 Wis. 2d 195, 990 N.W.2d 174, held that to the extent *S.H.* and other cases "can be read to permit in camera review of privately held, privileged health records in a criminal case upon a showing of materiality," that holding was expressly overruled.

Dyson v. Hempe, 140 Wis. 2d 792, 803, 413 N.W.2d 379 (Ct. App. 1987).

Whether a client has voluntarily disclosed confidential communications to third persons requires a finding of the historical facts, and a hearing on the issue should be held.

State v. Dalton, 98 Wis. 2d 725, 732–33, 298 N.W.2d 398 (Ct. App. 1980).

If the holder of the spousal privilege later discloses the confidential communication to other persons, then the privilege is waived and the person's spouse may testify.

905.12 Privileged matter disclosed under compulsion or without opportunity to claim privilege.

Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

Judicial Council Committee's Note (1974)

Wisconsin does not have a comparable statute and no case law has been found which deals with this section.

Rule 232 of the Model Code of Evidence follows Federal Rule 512 with regard to erroneously compelled disclosures.

Authors' Note. There is no rule 512 in the current Federal Rules of Evidence.

905.13 Comment upon or inference from claim of privilege; instruction.

(1) COMMENT OR INFERENCE NOT PERMITTED. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(2) CLAIMING PRIVILEGE WITHOUT KNOWLEDGE OF JURY. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(3) JURY INSTRUCTION. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

(4) APPLICATION; SELF-INCRIMINATION. Subsections (1) to (3) do not apply in a civil case with respect to the privilege against self-incrimination.

Judicial Council Committee's Note (1974)

Sub. (1). There is no comparable Wisconsin statute or case law. An analogy could be drawn with the right of self-incrimination as specified in s. 885.13(2). Rule 233 of the Model Code of Evidence would allow the judge and counsel to comment thereon. The jury is also allowed to draw reasonable inferences therefrom.

Sub. (2). There is no comparable Wisconsin statute or case law requiring this procedure. It would seem that the discretionary power that the trial court has would allow the court to employ this procedure if it so desired.

Sub. (3). While this rule requires the judge to give instruction if requested by a party claiming the privilege, the judge may give the instruction sua sponte. *Champlain v. State*, 53 Wis. 2d 751, 193 N.W.2d 868 (1972).

Sub. (4). Subsections 1, 2 & 3 are the proposed Federal Rule 513. In civil cases, Wisconsin case law permits an inference to be drawn against the interest of a witness who invokes the privilege of the Fifth Amendment. *Grognet v. Fox Valley Trucking Serv.*, 45 Wis. 2d 235, 172 N.W.2d 812 (1969); *Molloy v. Molloy*, 46 Wis. 2d 682, 176 N.W.2d 292 (1970). The addition of subsection (4) would conform this section with Wisconsin law.

Case Annotations

State v. Doss, 2008 WI 93, ¶ 81, 312 Wis. 2d 570, 754 N.W.2d 150.

In a criminal prosecution, a prosecutor improperly refers to a defendant's failure to testify and violates Wis. Stat. § 905.13(1) if the comment

1. Constitutes a reference to the defendant's failure to testify;
2. Proposes that the failure to testify demonstrates guilt; and
3. Is not a fair response to a defense argument.

State v. Heft, 185 Wis. 2d 288, 292–93, 517 N.W.2d 494 (1994).

In a criminal case, a defendant cannot compel a witness to invoke the Fifth Amendment privilege in the presence of the jury, even though the adverse inference raised by the witness's failure to testify would be supportive of an affirmative defense that need only meet the civil burden of proof, and such an adverse inference may be considered in a civil case. The distinction between the civil and criminal treatment of the witness's invocation of the privilege is constitutional.

905.14 Privilege in crime victim compensation proceedings.

(1) Except as provided in sub. (2), no privilege under this chapter exists regarding communications or records relevant to an issue of the physical, mental or emotional condition of the claimant or victim in a proceeding under ch. 949 in which that condition is an element.

(2) The lawyer-client privilege applies in a proceeding under ch. 949.

905.15 Privilege in use of federal tax return information.

(1) An employee of the department of health services, the department of children and families or a county department under s. 46.215, 46.22 or 46.23 or a member of a governing body of a federally recognized American Indian tribe who is authorized by

federal law to have access to or awareness of the federal tax return information of another in the performance of duties under s. 49.19 or 49.45 or 7 USC 2011 to 2049 may claim privilege to refuse to disclose the information and the source or method by which he or she received or otherwise became aware of the information.

(2) An employee or member specified in sub. (1) may not waive the right to privilege under sub. (1) or disclose federal tax return information or the source of that information except as provided by federal law.

905.16 Communications to veteran mentors.

(1) DEFINITIONS. As used in this section:

(a) A communication is "confidential" if not intended to be disclosed to 3rd parties other than to those persons present to further the interests of the veteran or member or to persons reasonably necessary for the transmission of the communication.

(b) A "veteran mentor" is an individual who meets all of the following criteria:

1. Served on active duty in the U.S. armed forces or in forces incorporated in the U.S. armed forces, served in a reserve unit of the U.S. armed forces, or served in the national guard.

2. Has successfully completed a judicially approved veterans mentoring training program.

3. Has completed a background information form approved by a circuit court judge from a county that is participating in a veterans mentoring program.

4. Is on the list of persons authorized by a circuit court judge to provide assistance and advice in a veterans mentoring program.

(c) "Veteran or member" means an individual who is serving or has served on active duty in the U.S. armed forces or in forces incorporated in the U.S. armed forces, in a reserve unit of the U.S. armed forces, or in the national guard.

(d) "Veterans mentoring program" is a program approved by a circuit court judge to provide assistance and advice to a veteran or member.

(2) GENERAL RULE OF PRIVILEGE. A veteran or member has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication made by the veteran or member to a veteran mentor while the veteran mentor is acting within the scope of his or her duties under the veterans mentoring program.

(3) WHO MAY CLAIM THE PRIVILEGE. The privilege may be claimed by the veteran or member, by the veteran's or member's guardian or conservator, or by the veteran's or member's personal representative if the veteran or member is deceased. The veteran mentor may claim the privilege on behalf of the veteran or member. The veteran mentor's authority to claim the privilege on behalf of the person is presumed in the absence of evidence to the contrary.

(4) EXCEPTION. There is no privilege under this section as to the following:

(a) A communication that indicates that the veteran or member plans or threatens to commit a crime or to seriously harm himself or herself.

(b) A communication that the veteran or member has agreed in writing to allow to be disclosed as a condition of his or her participation in the veterans mentoring program.

Chapter 18

General Requirements

906.01 General rule of competency.

Every person is competent to be a witness except as otherwise provided in these rules.

Judicial Council Committee's Note (1974)

The substance of this section is the elimination of the disqualification for interest provisions of the ancient common law, although the dead man's statutes survive. It is consistent with s. 885.13 for which there is no real need because the statute is simply declaratory of the common law. The substance of the statute is embodied in this rule which differs from Uniform Rule 17 and Model Code Rule 101. The word "competent" is substituted for the Model Code designation "qualified" or the Uniform Rule antonym "disqualified." The basic substantive change is the elimination from mention of the two prior code conditions to "qualification": that a witness must be capable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him; and that the witness is capable of understanding the duty of a witness to tell the truth. These conditions must exist in Wisconsin, *Collier v. State*, 30 Wis. 2d 101, 140 N.W.2d 252 (1966); *Musil v. Barron Elec. Co-op.*, 13 Wis. 2d 342, 108 N.W.2d 652 (1961); *State v. Schweider*, 5 Wis. 2d 627, 94 N.W.2d 154 (1959); s. 885.30. The effect of the application of Wisconsin case law and the statute is to leave to the judge the question of competency and admissibility initially and the question of sufficiency secondarily if admissibility is determined. If the proponent survives these tests, the jury ultimately assesses weight and credibility.

Adoption of s. 906.01 necessitates repeal of s. 885.30 and withdrawal of the case law thus removing from judicial determination the question of competency and admissibility; judicial determination of sufficiency and the jury assessment of the weight and credibility survive. The effect of the change is to shift the opponent's emphasis from a voir dire attack on competence to a cross-examination and introduction of refuting evidence as to weight and credibility.

Section 885.13 is repealed for the reason stated above. Section 885.19 is repealed because s. 906.01 assures competency of a witness convicted of a criminal offense; the balance of the statute providing for impeachment is covered in s. 906.09.

The question of the survival of the dead man's statutes, ss. 885.16 and 885.17, is left to the legislature. *See Estate of Molay*, 46 Wis. 2d 450, 175 N.W.2d 254 (1970); Comment, *Evidence Law in Wisconsin: Towards a More Practical Rationale and Codified Approach*, 1970 Wis. L. Rev. 1178, 1194.

Authors' Note. The dead man's statutes were repealed effective July 1, 2017. Wis. Sup. Ct. Order 16-01, 2017 WI 13, 373 Wis. 2d xiii (eff. July 1, 2017).

Case Annotations

State v. Magett, 2014 WI 67, ¶¶ 53–56, 355 Wis. 2d 617, 850 N.W.2d 42.

In a criminal case in which a defendant has pleaded not guilty by reason of mental disease or defect (NGI), the defendant is competent to testify as to the defense of lack of criminal responsibility.

Hughes v. Hughes, 223 Wis. 2d 111, 133, 588 N.W.2d 346 (Ct. App. 1998).

While the general rule of competency of witnesses may permit someone to testify as an evidentiary matter, it does not remove or negate the trial court's discretion to exclude the witness. In this instance, although a 14-year-old girl was competent within the meaning of Wis. Stat. § 906.01 to testify in her parents' postdivorce proceeding, the court nevertheless could properly determine that it was not in her best interest to testify about her preference regarding physical placement.

State v. Hanna, 163 Wis. 2d 193, 206, 471 N.W.2d 238 (Ct. App. 1991).

Both aspects of competency, the willingness or ability to speak the truth and the willingness or ability to communicate intelligent answers, are issues for the jury, because they go to the credibility and weight of a witness's testimony.

Peck v. Meda-Care Ambulance Corp., 156 Wis. 2d 662, 670–71, 457 N.W.2d 538 (Ct. App. 1990).

Although ethics rules provide proscriptions, as an evidentiary matter lawyers are not generally prohibited from testifying for their clients.

State v. Dwyer, 149 Wis. 2d 850, 855–56, 440 N.W.2d 344 (1989).

Under Wis. Stat. § 906.01, judges are no longer empowered to exclude a witness on grounds of incompetency except as stated in the rules. Competency issues are generally issues of credibility to be dealt with by the trier of fact. Even if a witness has difficulty understanding questions or is confused and inattentive, the court is not empowered to exclude the witness from testifying.

State v. Hanson, 149 Wis. 2d 474, 482, 439 N.W.2d 133 (1989).

Competency is no longer a test for the admission of a witness's testimony, except as provided in the rules. The only question is credibility, which will be resolved when the case is submitted on the merits.

State v. Smith, 125 Wis. 2d 111, 128–29, 370 N.W.2d 827 (Ct. App. 1985), *rev'd on other grounds*, 131 Wis. 2d 220, 388 N.W.2d 601 (1986).

A rambling, discordant, nonresponsive, and combative witness, whom the court determines does not meet a minimum standard of credibility necessary to permit a reasonable person to put any credence in the witness's testimony, may be excluded from testifying as incompetent.

State v. Daniels, 117 Wis. 2d 9, 16, 343 N.W.2d 411 (Ct. App. 1983).

It is not necessary for the district attorney or judge to voir dire witnesses to establish competency because of tender age. The issues of weight and credibility are matters for the finders of fact.

State v. Olson, 113 Wis. 2d 249, 253, 335 N.W.2d 433 (Ct. App. 1983).

A four-year-old child was competent to testify at a preliminary hearing.

An objection to a person's competency at a preliminary hearing will not constitute a continuing objection to the person's competency at trial. A separate objection must be made at that time.

State ex rel. Cox v. Department of Health & Soc. Servs., 105 Wis. 2d 378, 383–84, 314 N.W.2d 148 (Ct. App. 1981).

The trial court is in a better position to assess competency than an appellate court. Therefore, the trial court's decision regarding competency should not be reversed unless it is "clearly and manifestly wrong."

Competency has two aspects: (1) the mental capacity to understand the nature of the questions and to form and communicate intelligent answers, and (2) the moral responsibilities to speak the truth.

A witness's grant of immunity and receipt of money for expenses goes to the witness's credibility, not competency.

State v. Albright, 96 Wis. 2d 122, 127, 291 N.W.2d 487 (1980).

A criminal defendant is competent to testify on the defendant's own behalf.

Thomas v. State, 92 Wis. 2d 372, 381, 284 N.W.2d 917 (1979).

An objection to a witness's competency should be made after a thorough voir dire of the witness and before the administration of the oath and the taking of substantive testimony. The failure to conduct a voir dire of the witness and the failure to object to the witness's testimony at that time constitutes a waiver of the right to challenge the testimony on grounds of competency.

Marks v. State, 63 Wis. 2d 769, 780–81, 218 N.W.2d 328 (1974).

A court need not instruct a jury on the credibility of a child witness. Such an instruction is within the discretion of the court.

906.02 Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of s. 907.03 relating to opinion testimony by expert witnesses.

Judicial Council Committee's Note (1974)

This rule, correlative to the general exclusion of hearsay, is consistent with Wisconsin law, *Grunwald v. Halron*, 33 Wis. 2d 433, 147 N.W.2d 543 (1967); *Shaw v. Wuttke*, 28 Wis. 2d 448, 137 N.W.2d 649 (1965); *Lubner v. Peerless Ins. Co.*, 19 Wis. 2d 364, 120 N.W.2d 54 (1963). This section would bar the testimony of a witness who was totally unintelligible.

Case Annotations

State v. Kleser, 2010 WI 88, ¶¶ 98–103, 328 Wis. 2d 42, 786 N.W.2d 144.

The principles articulated in *State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), and *State v. Jensen*, 147 Wis. 2d 240, 432 N.W.2d 930 (1988), which generally prohibit an expert from "vouching" for or testifying as to the truthfulness of a witness, apply in a reverse-waiver hearing for a juvenile who is subject to original adult-court jurisdiction.

There is no requirement that an expert explicitly testify that the expert believes a person is telling the truth for the expert's opinion to constitute improper vouching testimony. Nor is the *Haseltine* rule restricted to cases in which the person who is vouched for testifies.

State v. Denton, 2009 WI App 78, ¶ 16, 319 Wis. 2d 718, 768 N.W.2d 250.

A computer-generated animation prepared by a nonexpert witness and offered to depict what witnesses saw and did during an alleged crime was inadmissible under Wis. Stat. § 906.02. The animation was not akin to a lay witness using a demonstrative device (such as a chalkboard) to supplement that witness's own testimony with an illustration because the witness who presented the animation in this case had no personal knowledge of the events it purported to depict.

James v. Heintz, 165 Wis. 2d 572, 579, 478 N.W.2d 31 (Ct. App. 1991).

Like any witness, an expert may establish a proper testimonial foundation by the expert's own testimony.

D.L. v. Huebner, 110 Wis. 2d 581, 622, 329 N.W.2d 890 (1983).

To be competent to testify, a witness must be able to speak on the basis of personal knowledge or experience.

906.03 Oath or affirmation.

(1) Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the witness's duty to do so.

(2) The oath may be administered substantially in the following form: Do you solemnly swear that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth, so help you God.

(3) Every person who shall declare that the person has conscientious scruples against taking the oath, or swearing in the usual form, shall make a solemn declaration or affirmation, which may be in the following form: Do you solemnly, sincerely and truly declare and affirm that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth; and this you do under the pains and penalties of perjury.

(4) The assent to the oath or affirmation by the person making it may be manifested by the uplifted hand.

Judicial Council Committee's Note (1974)

Sub. (1). This is the form of Federal Rule 603 relettered to accommodate the following subsections. The rule is consistent with old s. 887.025(1).

Sub. (2). This subsection was formerly s. 887.025(1), and required that "in all judicial proceedings the witnesses shall be sworn before testifying."

However, in *State ex rel. Shields v. Portman*, 242 Wis. 5, 6 N.W.2d 713 (1942) and *DeGroot v. Van Akkeren*, 225 Wis. 105, 273 N.W. 725 (1937) it was held that a child's solemn promise to tell the truth was an alternative to an oath and that the statute requiring an oath is directory, not mandatory. The Federal Advisory Committee's Note declares: "Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required." The first half of that explanation conforms with subs. (1) and (2) and is consistent with sub. (3) if it, too, is construed as directory and illustrative of a form of affirmation, rather than mandatory. The form of the oath has been simplified.

Sub. (3). This subsection was formerly s. 887.04(1).

Sub. (4). This subsection was formerly ss. 887.04(2) and 887.025(2).

Case Annotations

State v. Moeser, 2022 WI 76, ¶¶ 38–41, 405 Wis. 2d 1, 982 N.W.2d 45, *cert. denied*, 143 S. Ct. 2612 (2023).

Wis. Stat. § 906.03 contains a flexible standard for an oath or affirmation. Wisconsin statutes do not require specific language or formulaic procedures in the administration of the oath or affirmation requirement.

State v. Hanson, 149 Wis. 2d 474, 482–83, 439 N.W.2d 133 (1989).

A child "of tender years" who is a witness need not be formally sworn to fulfill the requirement of this section. How an oath is modified or dispensed with when testimony is elicited from young children lies in the sound discretion of the trial court. Great leeway is granted the trial

court in administering the oath. The true purpose of the oath is not to exclude a witness but merely to add a stimulus to truthfulness whenever such a stimulus is feasible.

State v. Davis, 66 Wis. 2d 636, 648, 225 N.W.2d 505 (1975).
It is not necessary to require a child to be formally sworn if the child solemnly promises to tell the truth.

906.04 Interpreters.
An interpreter is subject to the provisions of chs. 901 to 911 relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation.

Judicial Council Committee's Note (1974)

This section is consistent with Wisconsin practice. The rule is an advance from the Wisconsin law and practice in requiring the qualification of the interpreter as an expert. Too often parties supply an interpreter who is not sufficiently fluent in a language to meet testimonial needs. An inexpert interpreter may seriously handicap the effectiveness of a trial. An interpreter appointed by the court under its inherent authority could not be paid if he did not qualify as an expert. *Crawford County Sup'rs v. LeClerc*, 3 Pin. 325, 4 Chnd. 56 (1851). As an expert an interpreter will be qualified pursuant to s. 907.02 and can be supplied pursuant to s. 907.06.

Case Annotations

State v. Santiago, 206 Wis. 2d 3, 23–24, 556 N.W.2d 687 (1996).
An interpreter must be qualified as an expert and may function in several capacities. When an accused individual requires an interpreter and witnesses are to testify in a foreign language, it may be appropriate for the court to appoint two interpreters: one for the court and one for the accused. The factors that may support the need for two interpreters include the following: (1) the need to have an interpreter assist the accused in communicating with counsel while another interpreter translates witness testimony; (2) the concern that a jury may associate an interpreter translating for an accused with the accused and thus discount the translation or give it more credibility; and (3) the concern that an interpreter, through association with the accused, may become biased.

Hagenkord v. State, 100 Wis. 2d 452, 462–63, 302 N.W.2d 421 (1981).
The trial court properly allowed a medical student to explain complex medical terms to a jury. While the medical student's testimony was not substantive evidence, it was explanatory, and it was analogous to an interpreter's translation of a foreign language.

906.05 Competency of judge as witness.
The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Judicial Council Committee's Note (1974)

Neither statute nor case law in Wisconsin now so restricts a judge. The subject is touched indirectly by s. 885.29, which prohibits a judge from testifying to a matter of opinion in any action or proceeding where an attorney of record is related to the judge in the first degree. There are numerous other statutes which disqualify a judge from presiding which are not relevant to the instant subject. Section 885.29 is recommended for transfer to ch. 256.

Case Annotations

State v. Anson, 2005 WI 96, ¶¶ 30–34, 282 Wis. 2d 629, 698 N.W.2d 776.
A trial court, in making a determination under *Harrison v. United States*, 392 U.S. 219 (1968), about whether the defendant waived the defendant's constitutional protection against self-incrimination, may make credibility determinations. Those credibility decisions must be based on the paper record, not the trial judge's personal recollections of the defendant's family's courtroom interactions during trial. A judge who relies on the personal recollection of events not in the record as the basis for factual findings is acting as a witness in violation of Wis. Stat. § 906.05.

State v. Meeks, 2002 WI App 65, ¶¶ 25–27, 251 Wis. 2d 361, 643 N.W.2d 526, *rev'd on other grounds*, 2003 WI 104, 263 Wis. 2d 794, 666 N.W.2d 859.

In a competency hearing, a judge was not testifying when summarizing into evidence from notes and transcripts the proceedings of an earlier hearing presided over by the same judge and involving the same defendant.

906.06 Competency of juror as witness.

(1) AT THE TRIAL. A member of the jury may not testify as a witness before that jury in the trial of the case in which the member is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(2) INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.

Judicial Council Committee's Note (1974)

Sub. (1). This rule modifies the common law view that a juror may testify and return to the box (6 Wigmore s. 1910) and adopts the disqualification of the Uniform Rule 43. There is no contrary Wisconsin case law.

Sub. (2). Adoption of ss. 906.01 and 906.06(2) is consistent with *Boller v. Cofrances*, 42 Wis. 2d 170, 166 N.W.2d 129 (1969); *Kink v. Combs*, 28 Wis. 2d 65, 135 N.W.2d 789 (1965); *Olson v. Williams*, 270 Wis. 57, 70 N.W.2d 10 (1955); and *Brophy v. Milwaukee E.R. & T. Co.*, 251 Wis. 558, 30 N.W.2d 76 (1947); but would withdraw the limits upon verdict attack in *Miller v. Illinois Central R.R.*, 36 Wis. 2d 184, 152 N.W.2d 898, 32 A.L.R.3d 1348 (1967), and *Ford Motor Credit Co. v. Amodt*, 29 Wis. 2d 441, 139 N.W.2d 6, 18 A.L.R.3d 1123 (1966), which are: "(1) that substantial personal awareness of the alleged impropriety is within the direct and independent knowledge of one who did not serve as a member of the jury, (2) that such knowledge was not derived by such person from a juror after the jury's discharge, and (3) that the challenge to the integrity of the verdict originated from such person rather than from a juror." Note, *Impeachment of Jury Verdicts*, 53 Marq. L. Rev. 258 (1970). Thus s. 906.06(2) broadens the opportunity for attack upon allegedly improper jury verdicts or indictments. Although the Federal Advisory Committee Note disclaims a change in substantive law, nevertheless a change occurs in Wisconsin substantive law applicable to setting aside verdicts for irregularity because the competency of a juror's testimony, the source of knowledge of impropriety and the challenge to the verdict are interwoven. Note however that the matters to which a juror's testimony is competent are more narrowly circumscribed than in earlier drafts of the Proposed Federal Rules.

Section 906.06(2) does not relate to secrecy and disclosure as provided in Ch. 255, but merely to the competency of certain witnesses and evidence.

In view of the effect of this subsection on Wisconsin law, one should note that proscriptions upon post-trial jury interviews by lawyers may no longer be appropriate, although this rule does not purport to resolve the question. See American College of Trial Lawyers, Code of Trial Conduct s. 20(f) (rev. ed. 1972); Code of Professional Responsibility, DR 7108(d), Wis. Bar Bull. 41 (Supp. 1972).

Case Annotations

(1) At the Trial

(2) Inquiry into Validity of Verdict or Indictment

State v. Miller, 2009 WI App 111, ¶¶ 62–63, 320 Wis. 2d 724, 772 N.W.2d 188.

To be entitled to an evidentiary hearing inquiring into the validity of a verdict, the party seeking to set aside a verdict on grounds of extraneous prejudicial information or outside influence must make a preliminary showing by affidavit that the subject matter of the proposed hearing is within an exception to Wis. Stat. § 906.06(2). The affidavit must assert facts that, if true, would require a new trial. Whether such an affidavit meets the standard is a question of law.

A juror's change of his vote to "guilty" to end jury deliberations so he could go on an annual fishing trip was not, as a matter of law, an "outside influence" within the meaning of Wis. Stat. § 906.06(2).

Manke v. Physicians Ins. Co. of Wis., 2006 WI App 50, ¶¶ 43–45, 52–57, 289 Wis. 2d 750, 712 N.W.2d 40.

In a medical malpractice action, a dictionary definition of the word *neglect* that was brought in by one of the jurors and used during deliberations was extraneous information. Inquiry into the effect of extraneous information on jurors is inadmissible, and therefore the standard for prejudice is an objective one. Because the negligence of the defendant doctor was a central issue in this case and the definition of neglect differed significantly from the jury instructions, there was a reasonable probability that the dictionary definition would have had a prejudicial effect on the hypothetical average juror.

Grice Eng'g, Inc. v. Szyjewski, 2002 WI App 104, 254 Wis. 2d 743, 648 N.W.2d 487.

In a civil case involving an alleged clerical error in a jury verdict, five-sixths of the jurors "must be in agreement as to the error" for the trial court to correct it.

State v. Broomfield, 223 Wis. 2d 465, 477–79, 589 N.W.2d 225 (1999).

A juror was competent to testify about information he overheard about a prior hung jury involving the defendant and other bad acts the defendant allegedly committed, because the information was extraneous, potentially prejudicial, and improperly brought before the jury, in that the information was not on the record.

State v. Delgado, 215 Wis. 2d 16, 25–27, 572 N.W.2d 479 (Ct. App. 1997), *rev'd on other grounds*, 223 Wis. 2d 270, 588 N.W.2d 1 (1999).

The law permits inquiry into what was said during a jury's deliberations for only two purposes: (1) to determine whether a juror failed to reveal potentially prejudicial information during voir dire, and (2) to determine whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Anderson v. Burnett Cnty., 207 Wis. 2d 587, 593–97, 558 N.W.2d 636 (Ct. App. 1996).

The sole areas in which jurors are competent to testify concern extraneous information that was considered during the jury deliberations or outside influences. Extraneous information is information from a nonevidentiary source that is not part of the general life experiences that jurors bring to the jury room. Meanspiritedness and erroneous perceptions, although unfortunate, reflect a juror's mental process and are not extraneous information.

An exception to the competency rule applies when a juror's mental process demonstrates a bias that goes to fundamental issues, such as religion, race, and national origin. In such a case, the process is deemed infirm, and a juror is competent to testify about such biases. The evidence must demonstrate such a magnitude of prejudice as to constitute an obvious default of justice.

State v. Wulff, 200 Wis. 2d 318, 327–34, 546 N.W.2d 522 (Ct. App. 1996), *rev'd on other grounds*, 207 Wis. 2d 143, 557 N.W.2d 813 (1997).

"Extraneous information" within Wis. Stat. § 906.06(2) is not limited to "factual" information relating to the case but also includes extraneous "legal" information. Extraneous information must not be a part of the record and not part of the general knowledge expected of jurors. Thus, when a juror brought into deliberations a discussion with an attorney of the legal definition of *reasonable doubt*, "extraneous information" was brought into the jury deliberative process. It is then the burden of the state to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained; in this case, the state satisfied this burden.

State v. Yang, 196 Wis. 2d 359, 367, 538 N.W.2d 817 (Ct. App. 1995).

A juror's conversation about police procedures with an investigating officer during a break in deliberations was competent, admissible testimony. The procedures discussed concerned interpreters used to assist in investigating crimes involving non-English-speaking people. Based on the conversation, subsequently reported to the entire jury, the jury could have decided to discount the non-English-speaking victim's inconsistent statements in the belief that the inconsistencies were due to the lack of a qualified interpreter rather than a conscious effort by the victim to change her story.

State v. Heitkemper, 196 Wis. 2d 218, 225–26, 538 N.W.2d 561 (Ct. App. 1995).

A juror's statement to other jurors during deliberation that it was his professional opinion as a pharmacist that a defense witness was untruthful about drug use, because the quantities she testified she took would have knocked her out, was not extraneous information. The fact that unforeseen evidence falls within the expertise of a juror does not render it extraneous.

State v. Eison, 194 Wis. 2d 160, 174, 533 N.W.2d 738 (1995), *aff'g* 188 Wis. 2d 298, 525 N.W.2d 91 (Ct. App. 1994).

A juror's testimony that another juror brought two wrenches into the jury room to compare their finish with that attributed to a gun allegedly used by the defendant in the commission of the crime charged was extraneous because it was a nonevidentiary source coming "from the outside." Moreover, the wrenches were improperly brought to the jury's attention because they were not in the record. The wrenches were potentially prejudicial, because the jury's examination of them could have influenced its evaluation of the witnesses' identifications of the defendant as the person who committed the armed robberies at issue.

State v. Williquette, 190 Wis. 2d 677, 694–97, 526 N.W.2d 144 (1995).

Jurors are competent to testify about an alleged clerical error in their verdict, but all jurors must agree as to the error.

State v. Eison, 188 Wis. 2d 298, 305–06, 525 N.W.2d 91 (Ct. App. 1994), *aff'd*, 194 Wis. 2d 160, 533 N.W.2d 738 (1995).

Jurors' testimony that a juror had pulled the hood from his sweatshirt onto his head and pulled it tightly around his face in simulation of testimony at trial about the defendant's appearance was part of the deliberation process and was not extraneous information because the juror who performed the experiment just happened to be wearing the sweatshirt that day. The deliberation process cannot be sterilized from all external factors.

Castaneda v. Pederson, 185 Wis. 2d 199, 209–12, 518 N.W.2d 246 (1994).

The court held admissible testimony that a juror in a medical malpractice action conducted independent research during trial and learned that the average jury verdict in such cases was $1.5 million. Jurors may testify about the deliberation process in an effort to impeach the verdict when (1) the juror's affidavit indicates that extraneous information (rather than the deliberative processes of the jurors) came to the jury, (2) the extraneous information was improperly brought to the jury's attention, and (3) the extraneous information was potentially prejudicial. Juror testimony regarding extraneous, prejudicial information improperly brought to the jury's attention is admissible in either a civil or criminal case even if only one juror possesses the information because material prejudice on the part of even one juror impairs the right to an impartial jury.

State v. Messelt, 185 Wis. 2d 254, 267, 274–82, 518 N.W.2d 232 (1994).

Wis. Stat. § 906.06(2) does not prevent jurors from testifying for the purpose of determining whether a juror failed to reveal potentially prejudicial information during voir dire. Jurors may testify as to whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. The person offering the evidence must prove by clear, satisfactory, and convincing evidence that the juror made or heard the alleged statements or engaged in the conduct alleged. Once that determination is made, the court must determine if there is a "reasonable possibility" that the information would have a prejudicial effect on a hypothetical average juror.

Johnson v. Agoncillo, 183 Wis. 2d 143, 161, 515 N.W.2d 508 (Ct. App. 1994).

In a medical malpractice case, a juror's testimony that the deliberations included discussion of the effect of the verdict on the physician's career and on health-care costs and of the plaintiff's elective abortion was not admissible because it was not evidence of outside influence or extraneous prejudicial information.

State v. Marhal, 172 Wis. 2d 491, 497, 493 N.W.2d 758 (Ct. App. 1992).

A litigant has no automatic right to have an evidentiary hearing concerning matters within the exceptions (i.e., extraneous prejudicial information or outside influence improperly brought to the jury) to juror testimonial incompetency. The litigant must make a preliminary showing by affidavit or nonjuror evidence that the hearing and the resulting intrusion into the sanctity of the jury deliberations are warranted.

State v. Barthels, 166 Wis. 2d 876, 893, 480 N.W.2d 814 (Ct. App. 1992), *aff'd*, 174 Wis. 2d 173, 495 N.W.2d 341 (1993).

The entire jury need not be exposed to the extraneous information before the jury's verdict may be impeached.

State v. Casey, 166 Wis. 2d 341, 347, 479 N.W.2d 251 (Ct. App. 1991).

In a sexual-assault trial, the jury foreperson stated to the other 11 jurors during deliberations that she had been a sexual-assault victim and, like the victim in the trial, had not reported the incident. Because the information was not extraneous, it could not be used to impeach the verdict.

State v. Thomas, 161 Wis. 2d 616, 626–27, 468 N.W.2d 729 (Ct. App. 1991).

A juror's notation, made on the substantive instructions that the jury took with it into the jury room, was not competent evidence to be considered on appeal.

Laedtke v. Schering Corp., 148 Wis. 2d 142, 143, 434 N.W.2d 798 (Ct. App. 1988).

A juror's affidavit indicating that the jury's verdict was based on sympathy pertained to the jury's internal mental and emotional process and was not competent as evidence.

State v. Deer, 125 Wis. 2d 357, 367, 372 N.W.2d 176 (Ct. App. 1985).

A juror's note asking questions, viewed by other jurors, is neither extraneous prejudicial information nor an outside influence and so is incompetent to impeach the jury's verdict.

State v. Shillcutt, 119 Wis. 2d 788, 800–01, 350 N.W.2d 686 (1984).

Jurors' statements made during jury deliberations are not competent evidence to impeach a jury verdict even if they evince subjective prejudice.

State v. Poh, 116 Wis. 2d 510, 518, 520, 343 N.W.2d 108 (1984).

There is inherent difficulty involved in distinguishing between matters relating to a juror's mental processes and deliberations, as to which testimony is precluded, and extraneous matters improperly brought to the jury's attention, as to which testimony is permitted. To demonstrate that a juror is competent to testify under this section, the party seeking to impeach the verdict has the burden to prove that the juror's testimony concerns extraneous information (rather than the deliberative processes), that the extraneous information was improperly brought to the jury's attention, and that it was potentially prejudicial.

State v. Ott, 111 Wis. 2d 691, 696, 331 N.W.2d 629 (Ct. App. 1983).

The bringing of a dictionary definition of the term *depraved* to the jury room probably would affect the hypothetical average juror in a prejudicial way.

After Hour Welding, Inc. v. Laneil Mgmt. Co., 108 Wis. 2d 734, 739–41, 324 N.W.2d 686 (1982).

A court must not inquire into jurors' mental processes, including the effect of alleged prejudicial remarks on the jurors' deliberations. The only issue to which a juror may testify is whether or not prejudicial information was in fact brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Once that determination is made, the court then must make a determination as to whether or not prejudice resulted on the basis of the nature of the matter and its probable effect "upon a hypothetical average jury."

Chapter 19
Impeachment and Character Witnesses

906.07 Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling the witness.

Judicial Council Committee's Note (1974)

The limitations on impeachment of one's own witness have been condensed to an erroneous proscription that fails to acknowledge the examiner's right to explain his witness's testimony through self-contradiction or, in the interest of accuracy to contradict the witness through extrinsic evidence as distinguished from the proscribed intended disparagement of the witness's credibility. Although Wisconsin cases have recognized such permissible impeachment, *Tills v. Elmbrook Memorial Hosp.*, 48 Wis. 2d 665, 180 N.W.2d 699 (1970); *State v. Timm*, 244 Wis. 508, 12 N.W.2d 670 (1944); *State ex rel. Cleveland v. Common Council*, 177 Wis. 537, 188 N.W. 601 (1922); *Halwas v. American Granite Co.*, 141 Wis. 127, 123 N.W. 789 (1909), the rule in its abbreviated form—"one may not impeach his own witness"—has been repeated so often that its errors escape recognition. Widespread misapplication of a rule may itself be sufficient ground for its interment—but in any event, consistency compels it. Limitation of cross-examination to the scope of the direct examination is grounded in part on the concept of vouching. When the limited cross-examination rule was rejected, *Boller v. Cofrances*, 42 Wis. 2d 170, 166 N.W.2d 129 (1969), the concept of vouching was philosophically rejected although the rule against impeaching one's own witness has since been repealed, *Tills v. Elmbrook Hosp.*, *supra*, s. 885.12(7)(a) allows any party to impeach a witness by means of his deposition and s. 885.14(1) allows the calling and impeachment of an adverse party or person identified with him. However, the last half of the compound sentence concluding s. 885.14(1) is repealed because it embraces the limitation upon impeachment. Section 885.14(2) is repealed because it preserves the right to rebut or impeach and because of s. 906.07, becomes surplusage. Section 887.12(10) dealing with the effect of taking or using a deposition upon preserving or surrendering impeachment rights is repealed because the rule renders it surplusage. Ample authority in the judge to curb abuses of the right to impeach one's own witness may be found in ss. 904.03 and 906.11.

Authors' Note. *See also* Wis. Stat. § 972.09 (regarding hostile witnesses in criminal cases).

906.08 Evidence of character and conduct of witness.

(1) OPINION AND REPUTATION EVIDENCE OF CHARACTER. Except as provided in s. 972.11(2), the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to the following limitations:

(a) The evidence may refer only to character for truthfulness or untruthfulness.

(b) Except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(2) SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

(3) TESTIMONY BY ACCUSED OR OTHER WITNESSES. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to character for truthfulness.

Judicial Council Note (2017)

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. *See United States v. Abel*, 469 U.S. 45 (1984); *United States v. Fusco*, 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R. Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* at 161 (3d ed. 1998). The amendment conforms the language of the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity. See Advisory Committee Note to Rule 608(b) (stating that the Rule is "[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case …").

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403. *See, e.g.*, *United States v. Winchenbach*, 197 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent statement offered for impeachment is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403); *United States v. Lindemann*, 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403).

It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. *See United States v. Davis*, 183 F.3d 231, 257 n.12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)"). *See also* Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 Crim. Just. 28, 31 (Winter 1993) ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act").

For purposes of consistency the term "credibility" has been replaced by the term "character for truthfulness" in the last sentence of subdivision (b). The term "credibility" is also used in subdivision (a). But the Committee found it unnecessary to substitute "character for truthfulness" for "credibility" in Rule 608(a), because subdivision (a)(1) already serves to limit impeachment to proof of such character.

Judicial Council Committee's Note (1974)

Sub. (1). Attacking or supporting credibility of a witness with evidence of "reputation" is consistent with *Edwards v. State*, 49 Wis. 2d 105, 181 N.W.2d 383 (1970); *State v. Sabala*, 32 Wis. 2d 95, 145 N.W.2d 95 (1966); *State v. Baker*, 16 Wis. 2d 364, 114 N.W.2d 426 (1962); *State v. Wrosch*, 262 Wis. 104, 53 N.W.2d 779 (1952); and *Scrafield v. Rudy*, 266 Wis. 530, 64 N.W.2d 189 (1954). Only evidence of "reputation before suit is commenced" is admissible, *Abaly v. State*, 163 Wis. 609, 613, 158 N.W. 308, 310 (1916). The section continues the limitations that such evidence must be directed to truthfulness or untruthfulness and that such evidence cannot be offered until character is attacked. *State v. Eisenberg*, 48 Wis. 2d 364, 180 N.W.2d 529 (1970), *certiorari denied* 402 U.S. 987, 91 S. Ct. 1669, 29 L. Ed.2d 153, *rehearing denied* 403 U.S. 940, 91 S. Ct. 2250, 29 L. Ed.2d 721. The exception that an accused who testifies in his own behalf may, before attack, support his truthful character with reputation evidence is consistent with *Schultz v. State*, 133 Wis. 215, 113 N.W. 428 (1907). The section does not change the requirement that

reputation evidence must be "community based." The changing nature of that concept is illustrated in *United States v. White*, 225 F. Supp. 514, 522 (D.D.C. 1963) where the court said:

> Defendant argues that this rule is outdated in modern urban communities where people tend to move frequently. But such an objection can be met by a sensible scope of the word "community" rather than by an abandonment of the rule. The community in which a man lives is not necessarily a geographical unit, but is rather composed of those relationships with others which arise where a man works, worships, shops, relaxes, and lives. Evidence tending to show a defendant's reputation in such places is no more difficult to establish than his reputation in his particular city-block, …

Also see McCormick s. 44, and Wigmore ss. 1615 and 1616.

A major change in the Wisconsin law results from the admission of opinion evidence, which will not be geographically limited nor require the breadth of foundation required of reputation evidence. The admission of opinion evidence follows Wigmore's recommendation s. 1983, and is a return to early Wisconsin cases that permitted opinion evidence in special circumstances, *Dufresne v. Weise*, 46 Wis. 290, 1 N.W. 59 (1879); *Wilson v. State*, 3 Wis. 798 (1854).

Sub. (2). The retention of the limitation on the use of extrinsic evidence to attack credibility is in conformity with an ancient rule grounded upon confusion of issues and unfair surprise. Wigmore s. 979; *Banas v. State*, 34 Wis. 2d 468, 474, 149 N.W.2d 571 (1967), *certiorari denied* 389 U.S. 962, 88 S. Ct. 346, 19 L. Ed.2d 373; *Scrafield v. Rudy*, 266 Wis. 530, 533, 64 N.W.2d 189, 191 (1954); *Corti v. Cooney*, 191 Wis. 464, 211 N.W. 274 (1926); *Schultz v. State*, 133 Wis. 215, 228, 113 N.W. 428, 431 (1907); and *Lowe v. Ring*, 123 Wis. 107, 114, 101 N.W. 381, 383 (1904). The provision that permits cross-examination with respect to specific instances of conduct to test character evidence follows Wigmore's view and is particularly necessary because of the admission of opinion evidence. Wigmore ss. 988, 1111 and 1619. The last sentence of the subsection accords with ss. 901.04(4), 904.03 and 904.05(1). It is consistent with *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965), *certiorari denied* 384 U.S. 1017, 86 S. Ct. 1941, 16 L. Ed.2d 1039.

Case Annotations

(1) Opinion and Reputation Evidence of Character

State v. McReynolds, 2022 WI App 25, ¶¶ 24–35, 402 Wis. 2d 175, 975 N.W.2d 265 (review denied).

The investigating officer testified four times in various formulations that he found the statement of an informant to be credible. The court rejected the defendant's argument that these statements were received in violation of the *Haseltine* rule, determining that they were not offered to bolster the informant's credibility and did not interfere with the province of the jury to determine the informant's credibility. Instead, the court determined that the purpose and effect of the officer's testimony were to explain what he believed as he was conducting his investigation and why he proceeded with it.

> ***Authors' Note.*** This opinion begs the question why the thought process of the officer as he was conducting the investigation was relevant to whether the defendant committed the charged offense. Even if relevant, should the court have undertaken a balancing under Wis. Stat. § 904.03 to determine whether any relevance was substantially outweighed by the danger of unfair prejudice? Would a limiting instruction have been appropriate? The *Haseltine* issue was presented here in the context of an ineffective-assistance claim, and perhaps the court's discussion was limited accordingly, but the authors believe the questions they raise here should be part of a careful analysis under *Haseltine.*

State v. Johnson, 2004 WI 94, ¶ 20, 273 Wis. 2d 626, 681 N.W.2d 901.

It is permissible to impeach a witness by asking the witness questions about the accuracy of another witness's personal observations of the same event, because these questions undermine the credibility of the witness and highlight inconsistencies in the testimony.

> ***Authors' Note.*** *Johnson* resolves two lines of cases addressing the practice of cross-examining a witness regarding the truthfulness of another witness's testimony. In doing so, it overruled *State v. Kuehl*, 199 Wis. 2d 143, 545 N.W.2d 840 (Ct. App. 1995). The present rule is that such a cross-examination may be conducted if both lay witnesses have witnessed the same event (*Bolden* and *Jackson*), but an expert who did not witness the event cannot give an opinion as to the truthfulness of another witness (*Haseltine* and *Romero*).

State v. Bolden, 2003 WI App 155, ¶ 8, 265 Wis. 2d 853, 667 N.W.2d 364.

Asking a defendant on cross-examination whether a contradictory lay witness was telling the truth or was mistaken does not usurp the jury's function in assessing credibility in a criminal case. *See State v. Jackson*, 187 Wis. 2d 431, 523 N.W.2d 126 (Ct. App. 1994).

State v. Tutlewski, 231 Wis. 2d 379, 386–90, 605 N.W.2d 561 (Ct. App. 1999).

In a prosecution for the sexual assault of a person with a cognitive disability, the state presented the victim's former teacher as a witness to explain the nature of the victim's cognitive disability, but the witness also improperly stated that the victim was an honest person without the

capability to lie or be deceitful. While *Sturdevant v. State*, 49 Wis. 2d 142, 181 N.W.2d 523 (1970), permits impeachment of a witness with an impairment whose ability to perceive events or to tell the truth might be affected, there is no corresponding right to bolster an impaired witness's testimony beyond a discussion of (1) the nature of the disabilities, and (2) how the impairment affects the witness's ability to testify or recall particular facts. An explaining witness in this context cannot cross the line and testify that the impaired witness is telling the truth.

State v. Eugenio, 219 Wis. 2d 391, 398–405, 579 N.W.2d 642 (1998).

Assertions about a witness's character made during opening statements constitute an attack on the character for truthfulness of the witness under Wis. Stat. § 906.08(1) when, viewing the attack on the witness in its context, the trial court believes that a reasonable person would consider the attack to be an assertion that the witness is not only lying in this instance but is a liar generally. This holding rejects the broad "tantamount to an accusation that a witness is lying" test established in *State v. Anderson*, 163 Wis. 2d 342, 471 N.W.2d 279 (Ct. App. 1991), and *State v. Hernandez*, 192 Wis. 2d 251, 531 N.W.2d 348 (1995).

Nowatske v. Osterloh, 201 Wis. 2d 497, 504–07, 549 N.W.2d 256 (Ct. App. 1996).

The trial court erred in admitting into evidence prior unrelated medical malpractice actions filed against the plaintiffs' expert witness. Such evidence did not cast light on the witness's character for truthfulness or untruthfulness. In this case, however, the admission of such evidence was only harmless error.

State v. Kuehl, 199 Wis. 2d 143, 149–51, 545 N.W.2d 840 (Ct. App. 1995).

No witness, expert or otherwise, is permitted to give an opinion that another witness is truthful. Similarly, repeated questions requiring a witness to determine if some other witness is mistaken about the facts of the case is more than an attempt to simply explain witness discrepancies. It is not the purpose of the question that controls its admissibility; rather, it is whether the witness being questioned has any basis, foundation, or knowledge on which to premise a belief that another witness is telling the truth. Trial courts should exercise their superintending authority to intervene sua sponte when such questions are forwarded by counsel.

State v. Hilleshiem, 172 Wis. 2d 1, 20, 492 N.W.2d 381 (Ct. App. 1992).

A witness may testify regarding that witness's opinion of another witness's truthfulness based on the first witness's knowledge of the other witness gained outside the trial. On the other hand, no witness, expert or otherwise, is permitted to testify as to whether a person told the truth at trial. *See State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (1984).

State v. Jensen, 147 Wis. 2d 240, 250, 432 N.W.2d 913 (1988).

An expert may testify that a complainant's conduct following a sexual assault was consistent with that of a sexual-assault victim if the testimony is elicited to explain the context in which the complainant made his or her allegation and not to prove that the assault occurred.

State v. Romero, 147 Wis. 2d 264, 277, 432 N.W.2d 899 (1988).

A statement that the complaining witness "was honest with us from the time of the first interview through my subsequent contact with her" and other statements about the witness's "truthfulness" in an investigation did not qualify as opinions as to the complaining witness's character for truthfulness under Wis. Stat. § 906.08(1). Rather, they were impermissible opinions that the complainant's accusations were true.

State v. Haseltine, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth.

State v. Cuyler, 110 Wis. 2d 133, 138–39, 327 N.W.2d 662 (1983).

Reputation evidence and opinion evidence regarding character are admissible. The admissibility of opinion evidence represents a major change in Wisconsin law. Opinion evidence is not geographically limited and does not require a foundation that the witness giving the opinion is familiar with the community of the person about whom the witness is testifying. However, opinion evidence is not automatically admissible and may still be excluded if the witness lacks personal knowledge or if the probative value of the evidence is outweighed by its prejudicial effect.

State v. Spraggin, 77 Wis. 2d 89, 102 n.12, 252 N.W.2d 94 (1977).

The state may offer opinion testimony concerning the untruthfulness of the defendant. Specific instances of the defendant's conduct on which a witness's opinion is based cannot be inquired into on direct examination in the guise of qualifying the witness.

(2) Specific Instances of Conduct

Authors' Note. In cases interpreting Wis. Stat. § 906.08(2) before its amendment by Wis. Sup. Ct. Order 16-02A, 2017 WI 92, 378 Wis. 2d xiii (eff. Jan. 1, 2018), the rule referred to a witness's "credibility." Since the amendment, Wis. Stat. § 906.08(2) refers to a witness's "character for truthfulness."

State v. Rodriguez, 2006 WI App 163, ¶ 35, 295 Wis. 2d 801, 722 N.W.2d 136, *aff'd on other grounds on remand*, 2007 WI App 252, 306 Wis. 2d 129, 743 N.W.2d 460.

A prosecutor properly impeached a defendant during cross-examination by probing inconsistencies in his testimony and by using the words "lie" and "lying" in confronting the defendant on these inconsistencies.

State v. Missouri, 2006 WI App 74, ¶ 22, 291 Wis. 2d 466, 714 N.W.2d 595.

Bias or prejudice of a witness is not a collateral issue. Extrinsic evidence of racial bias or prejudice of a witness, so long as it is direct and positive and not remote and uncertain, may be used to discredit the testimony of the witness—in this case, a police officer.

State v. Moore, 2002 WI App 245, ¶¶ 14–15, 257 Wis. 2d 670, 653 N.W.2d 276.

Wis. Stat. § 906.08(2) prohibits bolstering a witness's credibility by extrinsic evidence of collateral matters. Thus, it was error to allow evidence of the witness's prior experience with the police to show his reliability.

State v. Evans, 187 Wis. 2d 66, 79–80, 522 N.W.2d 554 (Ct. App. 1994).

In a criminal prosecution for the sexual assault of a child, the court properly precluded the defendant from attacking the child's credibility with testimony concerning specific instances of false accusations she had made before the incident in question. The child did not testify at trial, but her statements accusing the defendant were admitted under various hearsay exceptions. The child was treated as a witness pursuant to Wis. Stat. § 908.06, but testimony concerning specific instances of past conduct was precluded because the evidence the defendant sought to introduce was not inconsistent with any of the child's hearsay statements.

State v. Rognrud, 156 Wis. 2d 783, 787–89, 457 N.W.2d 573 (Ct. App. 1990).

In a sexual-assault case, testimony by a companion of the complaining witness, who contradicted the complaining witness's allegations regarding a prior sexual assault and raised the issue of a prior false sexual-assault allegation, was extrinsic evidence on a collateral matter and, therefore, inadmissible. Pursuant to Wis. Stat. § 906.08(2), the complaining witness could only be asked about these specific instances of conduct on cross-examination.

State v. Amos, 153 Wis. 2d 257, 273, 450 N.W.2d 503 (Ct. App. 1989).

Generally, a witness cannot be impeached on the basis of specific instances of collateral facts introduced by extrinsic evidence. But there is no proscription against using extrinsic evidence introduced to show a corrupt testimonial intent (e.g., evidence of subornation of perjury tending to show a consciousness of guilt).

State v. Gulrud, 140 Wis. 2d 721, 733, 412 N.W.2d 139 (Ct. App. 1987).

The purpose of Wis. Stat. § 906.08(2) is to make inadmissible collateral facts intended solely to contradict the witness, which are not admissible for any recognized purpose. Evidence is collateral if it does not meet the following test: "Could the fact … have been shown in evidence for any purpose independently of the contradiction?"

State v. Boehm, 127 Wis. 2d 351, 358, 379 N.W.2d 874 (Ct. App. 1985).

For purposes of attacking credibility, specific instances of conduct that are probative of truthfulness or untruthfulness and not remote in time may be inquired into on cross-examination.

State v. Salter, 118 Wis. 2d 67, 75, 346 N.W.2d 318 (Ct. App. 1984).

Although a witness may give opinion testimony concerning the defendant's character for truthfulness, the trial court may exclude such evidence if the witness lacks personal knowledge. The trial court has the duty to satisfy itself that minimal levels of competency are met before receiving reputation or opinion evidence of character as to truthfulness. A psychiatrist may give an opinion as to the witness's character for truthfulness. However, when the psychiatrist had only one interview with the witness, and was uncertain from the offer of proof whether in fact he had an opinion as to truthfulness, it was within the discretion of the trial court to admit or exclude the evidence.

State v. Sonnenberg, 117 Wis. 2d 159, 167, 344 N.W.2d 95 (1984).

On cross-examination, it was permissible to ask the defendant whether he knew a woman and whether he had propositioned her because he had testified on direct examination that he never had a need to seek sexual satisfaction from anyone other than his spouse, and as such, it was impeaching. However, a question of this type is always subject to the additional objection of relevance if it is too remote in time or if found unfairly prejudicial.

▪

See also ....

State ex rel. Green Bay Newspaper Co. v. Circuit Ct., 113 Wis. 2d 411, 426–27, 335 N.W.2d 367 (1983) (evidence of witness's violation of secrecy oath in John Doe hearing not probative of truthfulness or untruthfulness)

(3) Testimony by Accused or Other Witnesses

906.09 Impeachment by evidence of conviction of crime or adjudication of delinquency.

(1) GENERAL RULE. For the purpose of attacking character for truthfulness, a witness may be asked whether the witness has ever been convicted of a crime or adjudicated delinquent and the number of such convictions or adjudications. If the witness's answers are consistent with the previous determination of the court under sub. (3), then no further inquiry may be made unless it is for the purpose of rehabilitating the witness's character for truthfulness.

(2) EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Factors for a court to consider in evaluating whether to admit evidence of prior convictions for the purpose of attacking a witness's truthful character include:

(a) The lapse of time since the conviction.

(b) The rehabilitation or pardon of the person convicted.

(c) The gravity of the crime.

(d) The involvement of dishonesty or false statement in the crime.

(e) The frequency of the convictions.

(f) Any other relevant factors.

(3) ADMISSIBILITY OF CONVICTION OR ADJUDICATION. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the court determines pursuant to s. 901.04 whether the evidence should be excluded.

(5) PENDENCY OF APPEAL. The pendency of an appeal therefrom does not render evidence of a conviction or a delinquency adjudication inadmissible. Evidence of the pendency of an appeal is admissible.

Judicial Council Note (2017)

The amendment to sub. (1) is intended to conform the rule more closely to current practice. It is consistent with *Nicholas v. State*, 49 Wis. 2d 683, 183 N.W.2d 11 (1971) and *State v. Bailey*, 54 Wis. 2d 679, 690, 196 N.W.2d 664, 670 (1972).

The following federal Advisory Committee Note regarding the 2006 amendment to federal Rule 609 is instructive.

> The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g.*, *United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction was offered for purposes of contradiction).

The amendment to sub. (2) continues to recognize the long-standing principle that this statutory exclusion is a "particularized application" of s. 904.03, *State v. Gary M.B.*, 2004 WI 33, ¶ 21, 270 Wis. 2d 62, 81, 676 N.W.2d 475, 485, and codifies the holding in *Gary M.B.* that circuit courts are required, in determining whether to admit or exclude prior convictions, to examine a number of factors. Majority op., ¶ 21; Chief Justice Abrahamson's dissent, ¶ 56; Justice Sykes' dissent, ¶ 85, *State v. Kuntz*, 160 Wis. 2d 722, 752, 467 N.W.2d 531 (1991); *State v. Kruzycki*, 192 Wis. 2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995); *State v. Smith*, 203 Wis. 2d 288, 295–96, 553 N.W.2d 824 (Ct. App. 1996). However, the committee recognizes that in conducting the balancing test, the circuit court need only consider those factors applicable to the case. *Kuntz*, 160 Wis. 2d at 753, 467 N.W.2d 531. Subsection (2) does not include expungement because evidence of a conviction expunged under Wis. Stat. § 973.015(1) is not admissible under this rule. *State v. Anderson*, 160 Wis. 2d 435, 437 (Ct. App. 1991).

In *State v. Gary M.B.*, the majority observed that "in the future, it would be prudent for circuit courts to explicitly set forth their reasoning in ruling on § 906.09(2) matters in order to demonstrate that they considered the relevant balancing factors applicable in the case before them." 2004 WI 33, ¶ 35, 270 Wis. 2d 62, 87–88, 676 N.W.2d 475, 488. Chief Justice Abrahamson noted, "[t]he purposes of requiring a circuit court to

perform this process on the record are many. The process increases the probability that a circuit court will reach the correct result, provides appellate courts with a more meaningful record to review, provides the parties with a decision that is comprehensible, and increases the transparency and accountability of the judicial system." Chief Justice Abrahamson's dissent, ¶ 48.

Judicial Council Committee's Note (1974)

Sub. (1). The section is a substantial alteration of the Federal Rule. The latter forbids impeachment with a conviction based upon a no contest plea; this rule rejects that limitation. The Federal Rule proposes that impeachment with a misdemeanor conviction be limited to one which involves dishonesty or false statement; in addition, the Federal Rule provides a 10-year limit upon the use of a conviction for impeachment and prohibits use of a conviction for impeachment if the witness has been "pardoned" or "rehabilitated." The Federal Rule by placing strict limitations upon the use of a criminal conviction makes the Rule administratively impractical. The limitations are appropriate but they should be considered by the judge in applying sub. (2). In *People v. Montgomery*, 47 Ill.2d 510, 268 N.E.2d 695 (1971), the Illinois Supreme Court prospectively adopted Rule 609 of the Proposed Federal Rules of Evidence. Wisconsin practice which permits direct examination of the accused with respect to whether he has ever been convicted of crime and how many times remains unchanged.

Sub. (2). Appropriate comments abstracted from the Federal Advisory Committee's Note are set forth:

Sub. (2). Few statutes recognize a time limit on impeachment by evidence of conviction. However, practical considerations of fairness and relevancy demand that some boundary be recognized. See Ladd, *Credibility Tests—Current Trends*, 89 U. Pa. L. Rev. 166, 176–77 (1940). This portion of the rule is derived from the proposal advanced in Recommendation Proposing an Evidence Code, s. 788(5), p. 142. Cal. Law Rev. Comm'n (1965), though not adopted. See California Evidence Code s. 788.

The most troublesome aspect of impeachment by evidence of conviction is presented when the witness is himself the accused in a criminal case. The conventional view, unhesitatingly supported by Wigmore, has been that an accused who elects to take the stand is subject to impeachment as a witness, including impeachment by proof of conviction. 3 Wigmore ss. 889 to 891. Yet there is apparent a growing uneasiness that impeachment in this form not only casts doubt upon his credibility "but also may result in casting such an atmosphere of aspersion and disrepute about the defendant as to convince the jury that he is an habitual lawbreaker who should be punished and confined for the general good of the community." *Richards v. United States*, 89 U.S. App. D.C. 354, 192 F.2d 602, 605, 30 A.L.R.2d 880 (1951), *certiorari denied* 342 U.S. 946, 72 S. Ct. 560, 96 L. Ed. 703, *reh'g denied* 343 U.S. 921, 72 S. Ct. 676, 96 L. Ed. 1334. See Griswold, *The Long View*, 51 A.B.A.J. 1017, 1021 (1965); Schaefer, *Police Interrogation and the Privilege Against Self-Incrimination*, 61 N.W.U. L. Rev. 506, 512 (1966); Kalven and Zeisel, *The American Jury*, 124, 126 to 130, 144 to 146 (1966). The probability of drawing the forbidden inference increases when the prior convictions are for the same crime as that now charged.

The most significant feature of the rule is the requirement that the evidence of conviction be excluded if the judge determines that its probative value is outweighed by the danger of unfair prejudice. It is a particularized application of s. 904.03. The provision finds its genesis in *Luck v. United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965). Prior to that decision, slight latitude was recognized for balancing probative value against prejudice, though some authority allowed or required the trial judge to exclude convictions remote in point of time. Referring to 14 D.C. Code s. 305, the court said:

> "It says, in effect, that the conviction 'may,' as opposed to, 'shall,' be admitted: and we think the choice of words in this instance is significant. The trial court is not required to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. The statute, in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case. There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction. [Footnote omitted.] There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility. This last is, of course, a standard which trial judges apply every day in other contexts; and we think it has both utility and applicability in this field. [Footnote omitted.]
>
> "In exercising discretion in this respect, a number of facts might be relevant, such as the nature of the prior crimes, [footnote omitted] the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction. The goal of a criminal trial is the disposition of the charge in accordance with the truth. The possibility of a rehearsal of the defendant's criminal record in a given case, especially if it means that the jury will be left without one version of the truth, may or may not contribute to that objective. The experienced trial judge has a sensitivity in this regard which normally can be relief upon to strike a reasonable balance between the interests of the defendant and of the public. We think Congress has left room for that discretion to operate." 348 F.2d at 768.

The Rule has been drafted with the view that a judge should consider whether from the lapse of time since the conviction, the rehabilitation or pardon of the person convicted, the gravity of the crime, the involvement of dishonesty or false statement in the crime, the elements noted in *Luck v. United States*, *supra*, and *Gordon v. United States*, 127 U.S. App. D.C. 343, 383 F.2d 936 (1967), *certiorari denied* 88 S. Ct. 1421, 390 U.S. 1029, 20 L. Ed.2d 287, the probative value of the evidence of the crime is substantially outweighed by the danger of undue prejudice.

The hazard of prejudice is acknowledged in *Nicholas v. State*, 49 Wis. 2d 683, 183 N.W.2d 11 (1971). The rule does not change the restrictions on the nature and extent of the inquiry with respect to criminal convictions when permissible [*Underwood v. Strasser*, 48 Wis. 2d 568, 180 N.W.2d 631 (1970); *State v. Hungerford*, 54 Wis. 2d 744, 196 N.W.2d 647 (1972)] nor prevent inquiry into the nature of a crime for the purpose of rehabilitating the witness, *State v. Bailey*, 54 Wis. 2d 679, 690, 196 N.W.2d 664, 670 (1972).

Sub. (3). This provision prevents the suggestion of inadmissible evidence to the jury. See s. 901.03(3) and comment.

Sub. (4). This subsection is consistent with *Deja v. State*, 43 Wis. 2d 488, 168 N.W.2d 856 (1969), and *Banas v. State*, 34 Wis. 2d 468, 149 N.W.2d 571 (1967), *certiorari denied* 389 U.S. 962, 88 S. Ct. 346, 19 L. Ed.2d 373. It does not affect *Triplett v. State*, 51 Wis. 2d 549, 187 N.W.2d 318 (1971).

Authors' Note. Wis. Stat. § 906.09(4) was repealed by 1995 Wis. Act 77, effective July 1, 1996.

Case Annotations

Authors' Note. Caution should be exercised in considering cases decided before changes to Wis. Stat. § 906.09 became effective on January 1, 2018. *See* Wis. Sup. Ct. Order 16-02A, 2017 WI 72, 378 Wis. 2d xiii (eff. Jan. 1, 2018). The amended rule requires the trial court to examine a number of factors in determining whether to admit or exclude prior convictions.

(1) General Rule

State v. Prescott, 2012 WI App 136, ¶¶ 16–23, 345 Wis. 2d 313, 825 N.W.2d 515.

The defendant was charged with first-degree reckless injury by use of a dangerous weapon and with possession of a firearm by a felon. The jury was informed of his prior conviction, because it was relevant to the latter charge. The defendant claimed ineffective assistance of counsel for failure to seek relief from the allegedly improper joinder of the two charges. He contended that his prior conviction was inadmissible with regard to his first-degree reckless injury charge under Wis. Stat. § 906.09(1) because he did not testify and put his credibility at issue. The court nevertheless concluded that the joinder was proper, because the charges arose out of the same act and two trials with the same evidence would have been against the interest of judicial economy. Although presenting evidence of the prior conviction in a trial on the charge of first-degree reckless injury prejudiced the defendant, the prejudice was not so substantial as to rebut the presumption of proper joinder.

State v. Harris, 2008 WI 15, ¶¶ 81–86, 307 Wis. 2d 555, 745 N.W.2d 397.

The criminal history of a defendant in a criminal case is ordinarily not admissible. Here, it was error for a witness to refer to the defendant's "court bail bond" and "recognizance of bond in a criminal case."

State v. Gary M.B., 2004 WI 33, ¶¶ 21, 31, 270 Wis. 2d 62, 676 N.W.2d 475.

Any prior conviction is relevant to a witness's character for truthfulness and admissible for the purpose of attacking a witness's credibility, because Wisconsin law presumes that criminals as a class are less truthful than persons who have not been convicted of a crime. However, the court must balance the probative value of any prior convictions against the danger of unfair prejudice pursuant to Wis. Stat. § 904.03.

State v. Quinsanna D. (In re Termination of Parental Rts. to Teyon D.), 2002 WI App 318, ¶¶ 18–20, 259 Wis. 2d 429, 655 N.W.2d 752.

In a trial for the termination of parental rights for failure to assume parental responsibility over children, the admissibility of evidence of the respondent-mother's criminal offenses was not governed by Wis. Stat. § 906.09, because the state offered the evidence specifically to support the claim that the respondent had not assumed parental responsibility, not simply to attack the credibility of the witness.

State v. Seefeldt, 2002 WI App 149, ¶¶ 24–26, 256 Wis. 2d 410, 647 N.W.2d 894, *aff'd*, 2003 WI 47, 261 Wis. 2d 383, 661 N.W.2d 822.

Criminal defense counsel's reference to a witness's outstanding warrants was not made for the purpose of asking the jury to think of the witness as an untruthful person. Rather, it was properly offered to show why the witness may have fled the scene, where the police had detained her and the defendant as part of a traffic stop, and why she may have been motivated to testify against the defendant.

State v. Leitner, 2002 WI 77, ¶ 39, 253 Wis. 2d 449, 646 N.W.2d 341.

An expunged record of conviction pursuant to Wis. Stat. § 973.015 (applicable to misdemeanors committed by individuals under 21) cannot be used at trial for impeachment under Wis. Stat. § 906.09(1).

State v. Scott, 2000 WI App 51, ¶¶ 17–26, 234 Wis. 2d 129, 608 N.W.2d 753.

In a criminal case, in which a defense witness serving lengthy consecutive sentences (including one life sentence) confesses to the crime charged against the defendant, that witness may be impeached on cross-examination as to the number of prior convictions, the total length of the

sentences, and the parole eligibility date, to show that the witness was confessing without risk of penal consequence.

State v. Smith, 203 Wis. 2d 288, 294–95, 297–98, 553 N.W.2d 824 (Ct. App. 1996).

Prior conviction of any crime is relevant to the credibility of a witness's testimony. Wisconsin recognizes that one who has been convicted of a crime is less likely to be truthful than one who has not been convicted. If evidence of prior convictions is allowed, witnesses may be asked if they have been convicted of a crime, and, if the answer is yes, the number of convictions. The nature of the convictions cannot be discussed by the impeaching party. The number of convictions is relevant to the witness's credibility, even without the jury being informed as to the nature of the convictions.

State v. Kruzycki, 192 Wis. 2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995).

The trial court properly allowed evidence of prior convictions of the defendant to be used in a sexual-assault trial that occurred 12 years after the earlier convictions, because the accused had been confined for much of the interim and had not had sufficient time to reform. Factors the trial court should consider before admitting evidence of prior convictions include the lapse of time since the conviction, the rehabilitation or pardon of the person, the gravity of the crime, the involvement of dishonesty or false statement in the crime, and whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

State v. Kuntz, 160 Wis. 2d 722, 751–53, 467 N.W.2d 531 (1991).

In an arson action, it was permissible to impeach the credibility of the defendant's testimony on the basis of a misdemeanor conviction not involving dishonesty. Wisconsin law presumes that all criminal convictions have some probative value regarding truthfulness. Any prejudice accompanying the introduction of misdemeanor convictions that did not involve dishonesty is mitigated by the restrictions placed on the scope of inquiry into past convictions.

State v. Trudeau, 157 Wis. 2d 51, 54, 458 N.W.2d 383 (Ct. App. 1990).

An accepted guilty plea is admissible under Wis. Stat. § 906.09(1). It is the criminal act and not the subsequent punishment that underlies the theory that prior convictions affect credibility.

State v. Rutchik, 116 Wis. 2d 61, 75–76, 341 N.W.2d 639 (1984).

Evidence of prior convictions is admissible for either the substantive purpose of proving motive, opportunity, intent, etc., as specified in Wis. Stat. § 904.04(2) or impeachment purposes under Wis. Stat. § 906.09. When such evidence is admitted for impeachment, the scope of the inquiry is very limited and is restricted to asking whether the witness has ever been convicted of a crime and, if so, how many times.

Voith v. Buser, 83 Wis. 2d 540, 543–46, 266 N.W.2d 304 (1978).

When accurate and responsive answers are given to the questions "Have you been convicted of a crime?" and "How many times?", the examiner is not permitted to introduce proof of the nature of the conviction.

Impeaching evidence to attack credibility is inappropriate and inadmissible before the issue of credibility has arisen during trial. Therefore, the defendant cannot be called adversely and questioned regarding the conviction of a crime.

State v. Bailey, 54 Wis. 2d 679, 690, 196 N.W.2d 664 (1972).

It is permissible for a party's own counsel to elicit information on the nature of prior crimes in the hope that the effect of the information on a jury will be less if it is brought out on direct instead of on cross-examination.

It is equally permissible when the witness has replied truthfully in response to the state's questions on cross-examination and an explanation of the crime is offered on redirect. The nature of the crime may be explained to rehabilitate the witness.

(2) Exclusion

Schultz v. Sykes, 2001 WI App 255, ¶ 29, 248 Wis. 2d 746, 638 N.W.2d 604.

The trial court's refusal to admit evidence of a witness's child-abuse and assault convictions, because these are not crimes of dishonesty, was upheld.

(3) Admissibility of Conviction

State v. Lobermeier, 2012 WI App 77, ¶ 17, 343 Wis. 2d 456, 821 N.W.2d 400.

Some convictions of a witness might not be admissible to impeach that witness. The court must first determine, pursuant to Wis. Stat. § 901.04, which convictions should be excluded.

Gyrion v. Bauer, 132 Wis. 2d 434, 438, 393 N.W.2d 107 (Ct. App. 1986).

Wis. Stat. § 906.09(3) prohibits the introduction of any evidence of criminal convictions until the trial court has ruled on the admissibility of the evidence. The trial court must make a threshold determination regarding the admissibility of prior convictions before there is any cross-examination about prior convictions.

State v. Bowie, 92 Wis. 2d 192, 203–04, 284 N.W.2d 613 (1979).

Convictions that have been reversed or set aside cannot be used. However, when a defendant failed to raise the issue that convictions had been reversed, he waived the right to have them excluded.

See also ....

State v. Pitsch, 124 Wis. 2d 628, 638–39, 369 N.W.2d 711 (1985) (hearing outside presence of jury on prior convictions required before cross-examination)

906.10 Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness's credibility is impaired or enhanced.

Judicial Council Committee's Note (1974)

Religious belief was a prerequisite to ancient common law capacity to take an oath and thus to competency of the witness. At common law, religious belief evolved from a question of competency to one of credibility and thereafter came to be a matter of privilege in the witness. The latter, fully applied, would exclude appropriate inquiry relative to interest, bias, and the like. This section restores perspective by limiting an attack upon the witness's credibility because of his religious beliefs. The rule is consistent with the Wisconsin Constitution, art. I, s. 19, which guarantees only competency of a witness irrespective of his religious opinions.

Chapter 20
Mode of Interrogation

906.11 Mode and order of interrogation and presentation.

(1) CONTROL BY JUDGE. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to do all of the following:

(a) Make the interrogation and presentation effective for the ascertainment of the truth.

(b) Avoid needless consumption of time.

(c) Protect witnesses from harassment or undue embarrassment.

(2) SCOPE OF CROSS-EXAMINATION. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.

(3) LEADING QUESTIONS. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily leading questions should be permitted on cross-examination. In civil cases, a party is entitled to call an adverse party or witness identified with the adverse party and interrogate by leading questions.

Judicial Council Committee's Note (1974)

Sub. (1). "The order in which witnesses shall be examined and cross-examined, the form of questions, and the manner in which the trial of cases shall be conducted in the trial court are largely within the discretion of the court." *Neider v. Spoehr*, 41 Wis. 2d 610, 617, 165 N.W.2d 171,

175 (1969); *St. Paul F. & M. Ins. Co. v. Laubenstein*, 168 Wis. 451, 455, 169 N.W. 613, 615 (1919). Also *see White v. State*, 45 Wis. 2d 672, 173 N.W.2d 649 (1970). Other illustrations of judicial discretion in the conduct of a trial: an exclusionary motion in limine, *Dutcher v. Phoenix Ins. Co.*, 37 Wis. 2d 591, 155 N.W.2d 609 (1968); admission or exclusion of an exhibit that serves a proper and improper purpose, *Schurpit v. Brah*, 30 Wis. 2d 388, 141 N.W.2d 266 (1966); sending exhibit to jury room, *Rodriguez v. Slattery*, 54 Wis. 2d 165, 172, 194 N.W.2d 817, 820–21 (1972); *Schnepf v. Rosenthal*, 53 Wis. 2d 268, 272, 193 N.W.2d 32, 35 (1972); *Sweifel v. Milwaukee Auto. Mut. Ins. Co.*, 28 Wis. 2d 249, 137 N.W.2d 6 (1965); reopening to offer further evidence, *Diener v. Heritage Mut. Ins. Co.*, 37 Wis. 2d 411, 155 N.W.2d 37 (1967). With aggressive administration by a trial judge this rule is as broad as Model Code Rule 105 and lacks only its specificity. Wisconsin has approved Morgan's exhortation to trial judges to act less like moderators of forums and more as presiding judges. Model Code, at 15; *Breunig v. American Family Ins. Co.*, 45 Wis. 2d 536, 546, 173 N.W.2d 619, 626 (1970). However, the trial judge's discretionary authority under this section and s. 904.03 is not unbridled. *Schueler v. City of Madison*, 49 Wis. 2d 695, 704, 183 N.W.2d 116 (1971); *State v. Hutnik*, 39 Wis. 2d 754, 159 N.W.2d 733 (1968). See s. 887.12(3).

Sub. (2). This section is consistent with Wisconsin law. *Boller v. Cofrances*, 42 Wis. 2d 170, 166 N.W.2d 129 (1969); *Schueler v. City of Madison*, 49 Wis. 2d 695, 183 N.W.2d 116 (1971). Although leading questions are ordinarily permitted in cross-examination, the wide open cross-examination rule does not necessarily permit leading questions in all cross-examination. *See Neider v. Spoehr*, 41 Wis. 2d 610, 617–18, 165 N.W.2d 171, 175 (1969); *Boller v. Cofrances*, *supra*; *Schueler v. City of Madison*, *supra*; McCormick ss. 24–25 at 47–49.

Sub. (3). Wisconsin cases agree that avoidance of leading questions is preferred unless justified by circumstances such as youth, exhaustion of unaided memory, hostility or inability to communicate because of ignorance or mental or language deficiencies. 22 West's Wis. Digest 323. Statement of the rule will not eliminate the need for judicial discretion in determining whether the circumstances justify a leading and suggestive question or whether it truly is leading and suggestive. The rule does not proscribe the suggestion of a subject as distinguished from an answer, *Rausch v. Buisse*, 33 Wis. 2d 154, 146 N.W.2d 801 (1966); *Zenou v. State*, 4 Wis. 2d 655, 91 N.W.2d 208 (1958); *Born v. Rosenow*, 84 Wis. 620, 54 N.W. 1089 (1893).

Ordinarily, the use of leading questions on cross-examination is permitted in Wisconsin, *State v. Sabala*, 32 Wis. 2d 95, 145 N.W.2d 95 (1966); *Hempton v. State*, 111 Wis. 127, 86 N.W. 596 (1901); but considerations referred to in sub. (1) may alter the practice. For a parallel, *see Schueler v. City of Madison*, 49 Wis. 2d 695, 183 N.W.2d 116 (1971). Note that leading questions may be used to impeach "one's own witness" under s. 906.07.

The right of adverse examination under this rule would enlarge Fed. R. Civ. P. 43(b) more than the broader right of adverse examination under s. 885.14(1). *See Skornia v. Highway Pavers, Inc.*, 34 Wis. 2d 160, 148 N.W.2d 678 (1967), and cases cited therein. The federal cases cited by the Federal Advisory Committee as illustrations of the rule's application would withdraw the rule of *Voss v. Metropolitan Casualty Ins. Co.*, 266 Wis. 150, 63 N.W.2d 96 (1954), that insured host-husband not named as party was not adverse to plaintiff guest-wife. The test of "adversity" continues, but enlarging the right of adverse examination to a witness "identified with" an adverse party, extends the right beyond the present "interest" and "status" limitations of the statute, but not to the extent attempted in *Hillstead v. Smith*, 44 Wis. 2d 560, 569, 171 N.W.2d 315, 319 (1969), which remains unaffected by this rule. This rule, like the statute, does not apply to criminal cases. *State v. Bergenthal*, 47 Wis. 2d 668, 688, 178 N.W.2d 16, 27 (1970), *certiorari denied* 402 U.S. 972, 91 S. Ct. 1657, 29 L. Ed.2d 136. Because s. 885.14(1) is narrower than this rule, it is repealed.

Case Annotations

(1) Control by Judge

State v. Mercado, 2021 WI 2, ¶¶ 50, 53, 395 Wis. 2d 296, 953 N.W.2d 337.

The trial court may allow a child to testify before showing a video-recording of the child's statement pursuant to Wis. Stat. § 908.08 under its general authority to reasonably control the "mode and order of … presenting evidence" under Wis. Stat. § 906.11. The supreme court expressly disavowed any interpretation of *State v. James*, 2005 WI App 188, 285 Wis. 2d 783, 703 N.W.2d 727, to the contrary.

State v. Anthony, 2015 WI 20, ¶¶ 64, 75–76, 361 Wis. 2d 116, 860 N.W.2d 10.

A criminal defendant was properly denied his right to testify in his own defense when the evidence he intended to offer would have impeded the court's obligation to control the presentation of evidence so as to ensure a fair and reliable trial process. A defendant may forfeit a fundamental constitutional right by engaging in conduct that is incompatible with the assertion of that right.

State v. Schmidt, 2012 WI App 113, ¶ 46, 344 Wis. 2d 336, 824 N.W.2d 839.

A court has broad discretion in the conduct of its proceedings. It is appropriate for a trial court, rather than defense counsel, to conduct the nonadversarial questioning of the defendant at an *in camera* hearing.

Authors' Note. Although the Seventh Circuit upheld the defendant's conviction in a later habeas corpus proceeding, it nevertheless admonished that "trial courts should not opt to hold *ex parte* hearings and silence defense counsel over other, less severe alternatives without exceedingly good reasons. Even then, trial courts must, if necessary, obtain a knowing and voluntary right-to-counsel waiver from the accused for purposes of the hearing." *Schmidt v. Foster*, 911 F.3d 469, 487 (7th Cir. 2018).

State v. McClaren, 2009 WI 69, ¶¶ 1, 3, 6, 47, 50, 318 Wis. 2d 739, 767 N.W.2d 550.

Pursuant to its inherent powers to ensure the orderly presentation of evidence at trial and the authority granted by Wis. Stat. § 906.11, the trial court may, by means of a pretrial order, require a criminal defendant who claims self-defense to disclose "*McMorris* evidence"—evidence of violent acts the victim had committed, which the defendant knew about at the time of the alleged crime—to permit a pretrial determination of the admissibility of such evidence.

The trial court may use the sanction of exclusion only if the court first considers lesser sanctions and determines the violation was "willful and motivated by a desire to obtain a tactical advantage."

State v. Payette, 2008 WI App 106, ¶¶ 51–59, 313 Wis. 2d 39, 756 N.W.2d 423.

It is within the trial court's discretion in controlling the conduct of parties and witnesses to prohibit a defendant at sentencing from looking at a victim when the victim offers an unsworn sentencing statement.

State v. Pfaff, 2004 WI App 31, ¶ 40 n.6, 269 Wis. 2d 786, 676 N.W.2d 562.

Refusing to extend a standing sequestration order was within the trial court's authority to exercise reasonable control over the mode and order of interrogating witnesses and the presentation of evidence.

State v. Ross, 2003 WI App 27, ¶¶ 48–51, 260 Wis. 2d 291, 659 N.W.2d 122.

In this criminal trial, the trial court's in-court admonishment to the defendant-witness concerning his style of testimony was within the proper range of the court's power to exercise reasonable control over the presentation of evidence, particularly because the trial court's comments before the jury did not reflect on the defendant's credibility or issues germane to the merits of the case.

State v. Smith, 2002 WI App 118, ¶¶ 14–15, 254 Wis. 2d 654, 648 N.W.2d 15.

While Wis. Stat. § 906.11 allows the trial court discretionary control over the conduct of the trial, including the extent of cross-examination, the form of questions, the admission or exclusion of exhibits, and sending exhibits to the jury room, the rule yields to specific statutes that control the introduction of evidence, such as Wis. Stat. § 906.13(2).

State v. Shanks, 2002 WI App 93, ¶¶ 10–12, 253 Wis. 2d 600, 644 N.W.2d 275.

In a prosecution for sexual assault of a child, the trial court acted within its discretion when it permitted a three-year-old victim to sit in her grandmother's lap while testifying. The trial court has the power to alter courtroom procedures to protect the emotional well-being of a child witness.

Waters v. Pertzborn, 2001 WI 62, ¶¶ 29–31, 243 Wis. 2d 703, 627 N.W.2d 497.

Wis. Stat. § 906.11(1) does not permit the trial judge, over the objection of a party, to bifurcate issues for trial before different juries.

Siker v. Siker, 225 Wis. 2d 522, 539–40, 593 N.W.2d 830 (Ct. App. 1999).

In a divorce proceeding, it was appropriate for the trial court to refuse to allow the petitioner's business evaluator to testify on rebuttal, when the expert had ample opportunity to explain his valuation on direct, cross, redirect, and recross. The issue that the petitioner's expert sought to address was not a "new fact" warranting rebuttal testimony.

State v. Eugenio, 219 Wis. 2d 391, 406–13, 579 N.W.2d 642 (1998).

The common-law rule of completeness, as applied to oral statements, is codified as part of Wis. Stat. § 906.11. Under this rule, the court has discretion to admit only those statements that are necessary to provide context and prevent distortion. When such statements fall within the definition of hearsay, the court in its discretion may admit them after determining whether the fairness requirement of the rule of completeness outweighs the principles underpinning the exclusionary rules.

Authors' Note. Wis. Stat. § 901.07 was amended in 2018 to incorporate *Eugenio*. *See* Wis. Sup. Ct. Order 16-02A, 2017 WI 92, 378 Wis. 2d xiii (eff. Jan. 1, 2020).

State v. Olson, 217 Wis. 2d 730, 738–42, 579 N.W.2d 802 (Ct. App. 1998).

A chart used to summarize and organize admitted evidence, even if not admissible as a "summary" under Wis. Stat. § 910.06, may be admissible under Wis. Stat. § 906.11(1) as a "pedagogical device." No hard-and-fast rule controls whether pedagogical devices are admissible, and admissibility depends on the circumstances of each case. The trial court is allowed discretion in making this determination. Complex facts of

a trial may indicate that a pedagogical device can be useful for jurors so as to make the presentation of evidence effective for ascertaining the truth.

The preparation of a chart in the presence of the jury, opposing counsel, and the court reduces the potential that the chart will contain substantial inaccuracies.

James v. Heintz, 165 Wis. 2d 572, 581, 478 N.W.2d 31 (Ct. App. 1991).

The trial court's refusal to permit the plaintiff's attorney to show evidentiary pictures during his opening statement because they were not previously marked as exhibits was an inappropriate exercise of discretion.

Town of Geneva v. Tills, 129 Wis. 2d 167, 179–82, 384 N.W.2d 701 (1986).

Although a judge has relatively broad discretion in directing the mode of cross-examination, the absolute right to exclude cross-examination questions is sharply limited by the last sentence of Wis. Stat. § 906.11(2). The judge does not have the discretion to allow the admission of testimony when the right of cross-examination is limited by the circumstances.

It is expected that writings on which a witness will rely in the course of the witness's testimony will be available for inspection by the cross-examiner. It was error for the court to allow a witness to testify telephonically, when counsel could not cross-examine him because the witness testified based on exhibits that were unavailable to counsel to use in his cross-examination. However, it is not error per se to allow telephonic testimony in a civil jury case.

> ***Authors' Note.*** Telephonic testimony is addressed generally in Wis. Stat. § 807.13 for civil proceedings and in Wis. Stat. § 967.08 for criminal proceedings.

State v. Stawicki, 93 Wis. 2d 63, 76, 286 N.W.2d 612 (Ct. App. 1979).

The trial court has broad authority to control the order of interrogating witnesses. Witnesses may be taken out of order, particularly when no objection is made. This also conforms with the goal of fairness of administration prescribed by Wis. Stat. § 901.02.

(2) Scope of Cross-Examination

State v. Hoover, 2003 WI App 117, ¶¶ 20–22, 265 Wis. 2d 607, 666 N.W.2d 74.

The court did not violate the defendant's constitutional right to confront and cross-examine a witness testifying against him by prohibiting questions concerning the witness's sentence in the absence of a sentencing-for-testimony agreement. Defense counsel had the opportunity to establish potential bias of the witness by questioning him about his charges and the terms of his plea agreement.

State v. Van Straten, 140 Wis. 2d 306, 318, 409 N.W.2d 448 (Ct. App. 1987).

A party may inquire on cross-examination as to whether a witness's testimony has been influenced by another, if the cross-examiner reasonably suspects that the circumstances giving rise to the question are true.

Rogers v. State, 93 Wis. 2d 682, 691, 287 N.W.2d 774 (1980).

The scope of cross-examination for impeachment purposes is discretionary with the trial court. However, more latitude should be given on cross-examination when the other side's case depends on the testimony of a single witness.

State v. Johnson, 74 Wis. 2d 26, 35, 245 N.W.2d 687 (1976).

No matter how wide open cross-examination may be, evidence cannot be admitted that is otherwise inadmissible. Thus, merely because information was brought out on direct examination regarding conversations with the defendant, inquiry into other matters included in the conversation may be precluded because they are hearsay or on some other ground.

(3) Leading Questions

State v. Barnes, 203 Wis. 2d 132, 138–40, 552 N.W.2d 857 (Ct. App. 1996).

Questions can be leading in a number of ways: the form of the question, the emphasis of certain words, the tone of the questioner, the questioner's nonverbal conduct, or the inclusion of facts still in controversy in the question itself. The rules of evidence do not per se forbid leading questions.

Leading questions may be allowed "when the witness is immature, timid[,] or frightened; when the testimony relates to introductory or undisputed matter; when the witness's recollection is exhausted; when the witness is in such a physical or mental condition that he or she ought be spared the effort of responding in extended answers; or when the witness is called to disprove prior testimony of another witness." Consequently, whether to bar a question because of its leading nature is discretionary with the trial court. In this case, the trial court did not erroneously exercise its discretion in allowing leading questioning of a 10-year-old witness who was timid and frightened, and when there was no evidence to suggest that the leading questions supplied the witness with a false memory.

Erbstoeszer v. American Cas. Co., 169 Wis. 2d 637, 644–46, 486 N.W.2d 549 (Ct. App. 1992).

In civil cases generally, leading questions can be asked only of an "adverse party" or of a witness "identified with" an adverse party. If more than one party is adverse to a witness, both parties may be entitled to adversely examine that witness.

It is generally inappropriate for a court to allow other counsel to examine a witness called adversely. A trial judge may, however, allow additional questions by another party entitled to question that witness adversely. When the judge does so, the record must clearly show the judge was conscious of the implication of the judge's action and show that the judge exercised discretion on a legally recognized basis.

Herman v. Milwaukee Children's Hosp., 121 Wis. 2d 531, 555, 361 N.W.2d 297 (Ct. App. 1984).

It is appropriate for a trial judge to consider the commonality of interest between defendants in determining whether to allow cross-examination. When a witness is closely associated with a party not adverse to another party, it is not an erroneous exercise of discretion to restrict a party's right to cross-examine that witness.

State v. Shaffer, 96 Wis. 2d 531, 547, 292 N.W.2d 370 (Ct. App. 1980).

The trial court may allow leading questions in direct examination if, in its discretion, it finds the nature of the question was necessary. However, leading questions usually are not to be used in direct examination.

State v. Sarinske, 91 Wis. 2d 14, 45–46, 280 N.W.2d 725 (1979), *overruled on other grounds by State v. Wayerski*, 2019 WI 11, 385 Wis. 2d 344, 922 N.W.2d 468.

A leading question is one that unmistakenly suggests the desired answer. It is within the trial court's discretion to determine whether a question is truly leading and suggestive and whether the circumstances justify a leading and suggestive question.

Chapter 21
Use of Writings and Prior Statements

906.12 Writing used to refresh memory.

If a witness uses a writing to refresh the witness's memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the judge in the judge's discretion determines that the interests of justice so require, declaring a mistrial.

Judicial Council Committee's Note (1974)

This section is consistent with Wisconsin law, *Merlino v. Mutual Serv. Casualty Ins. Co.*, 23 Wis. 2d 571, 127 N.W.2d 741 (1964); *Harper, Drake & Assocs. v. Jewett & Sherman Co.*, 49 Wis. 2d 330, 182 N.W.2d 551 (1971); *Gilbertson v. State*, 205 Wis. 168, 236 N.W. 539 (1931); *Williams v. Duluth St. R. Co.*, 169 Wis. 261, 171 N.W. 939 (1919); *Molzahn v. Christensen*, 152 Wis. 520, 139 N.W. 429 (1913). Many Wisconsin cases, because the fact situations do not require it, fail to distinguish the use of memorandum to revive present recollection and admission of a memorandum as "past recollection recorded" [See s. 908.03(2)(e)] and fail to discuss whether the proponent or opponent may offer the memorandum into evidence. Although this rule relates to offer of the memorandum by an adverse party, one should remember that s. 901.07 prevents him from selecting only those parts favorable to his position.

The rule is consistent with the in camera technique authorized in civil [*Stelloh v. Liban*, 21 Wis. 2d 119, 124 N.W.2d 101 (1963); *State ex rel. Ampco Metal, Inc. v. O'Neill*, 273 Wis. 530, 78 N.W.2d 921, 62 A.L.R.2d 501 (1956)] and criminal [*State v. Richards*, 21 Wis. 2d 622, 124 N.W.2d 684 (1963); *State v. Yancey*, 32 Wis. 2d 104, 145 N.W.2d 145 (1966)] cases, and with s. 971.24.

The authority granted to the prosecution to elect not to produce the memorandum in a criminal case and suffer an order striking the testimony or a mistrial induced by the prosecution may foreclose a retrial is uncertain. *See U.S. v. Davis*, 369 F.2d 775 (4th Cir. 1967) *cert. den.*, 386 U.S. 909, 87 S. Ct. 858, 17 L. Ed.2d 783 (1967) and cases collected in Decennial Digests, Criminal Law, Key No. 182.

Case Annotations

Kuklinski v. Rodriguez, 203 Wis. 2d 324, 338, 552 N.W.2d 869 (Ct. App. 1996).
Anything used to refresh a witness's memory for the purpose of testifying, either before or while testifying, is available to the opponent.

State ex rel. Huser v. Rasmussen, 84 Wis. 2d 600, 609, 267 N.W.2d 285 (1978).
The oral testimony of a witness is admissible after the witness reviews a document only if the witness states first that the witness now has independent recall of the facts. If the witness has no independent recall, the rule of past recollection recorded, Wis. Stat. § 908.03(5), is applicable. In such a case, the writing itself, but not the witness's testimony, may be admitted.

Gerner v. Vasby, 75 Wis. 2d 660, 663, 250 N.W.2d 319 (1977).
A witness's testimony was not incredible as a matter of law simply because he relied on his business records to refresh his memory.

906.13 Prior statements of witnesses.

(1) EXAMINING WITNESS CONCERNING PRIOR STATEMENT. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown or its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel upon the completion of that part of the examination.

(2) EXTRINSIC EVIDENCE OF PRIOR INCONSISTENT STATEMENT OF A WITNESS. (a) Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable:

1. The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement.

2. The witness has not been excused from giving further testimony in the action.

3. The interests of justice otherwise require.

(b) Paragraph (a) does not apply to admissions of a party-opponent as defined in s. 908.01(4)(b).

Judicial Council Committee's Note (1974)

Sub. (1). The Queen's case rule may have been rejected in *Kalk v. Fielding*, 50 Wis. 339, 7 N.W. 296 (1880); in any event it has not been expressly adopted. The need to warn the witness of forthcoming impeachment, whether through a prior oral or written statement, by inquiring whether the statement was made, was adopted in *Ketchingman v. State*, 6 Wis. 426 (1857). Both rules have been criticized as a misunderstanding of the original writings rule, Wigmore s. 1259, and as an unnecessary warning or opportunity to explain what he already knows, Wigmore ss. 1025 to 1039. The federal rule is modified with respect to the provision for disclosure to counsel designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary. Such an insinuation is precluded by Canon 7, DR 7-106(c)(1) of the Code of Professional Responsibility:

In appearing in his professional capacity before a tribunal a lawyer shall not: (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

The modification by a provision for disclosure "upon the completion of that part of the examination" is designed to: (1) preclude a premature objection that would have the effect of warning the witness, (2) afford opposing counsel the opportunity to enable an explanation by the witness.

Sub. (2). Except for the authority extended to the judge to relieve from the condition precedent in the interests of justice, the rule is in accord with Wisconsin law, *Bullock v. State*, 53 Wis. 2d 809, 818, 193 N.W.2d 889, 893 (1972); *State v. Johnson*, 221 Wis. 444, 267 N.W. 14 (1936); *Musha v. United States & G. Co.*, 10 Wis. 2d 176, 102 N.W.2d 243 (1960); *Zweifel v. Milwaukee Auto. Mut. Ins. Co.*, 28 Wis. 2d 249, 137 N.W.2d 6 (1965). That provision modifies the "prior warning" condition to extrinsic evidence of impeachment. The rule is further modified to eliminate the "prior warning" condition where a witness has not been excused from further testimony. This rule, as altered from the federal rule, is based upon Cal. Evid. Code s. 770 (West 1966). The Proposed Federal Rule is somewhat broader in its elimination of the "prior warning" condition.

Authors' Note. See also Wis. Stat. § 908.01(4)(a), which has been interpreted to allow prior inconsistent statements by witnesses to be admissible as substantive evidence.

Case Annotations

State v. Smith, 2002 WI App 118, ¶ 13, 254 Wis. 2d 654, 648 N.W.2d 15.

A prior inconsistent statement is admissible under Wis. Stat. § 906.13(2) without first confronting the witness with that statement if the witness has not been excused from giving further testimony in the action.

State v. Hereford, 195 Wis. 2d 1054, 1074, 537 N.W.2d 62 (Ct. App. 1995).

Wis. Stat. § 906.13 applies in criminal proceedings and is not superseded by the criminal discovery statute, formerly numbered Wis. Stat. § 971.24 (now Wis. Stat. § 971.23), which serves a different purpose. Wis. Stat. § 906.13 serves to ensure that the statement on which the witness is examined was in fact made and is not misrepresented by counsel in the examination of the witness. The purpose of the criminal discovery statute is to provide opposing counsel with prior statements of a witness to test whether the witness's testimony is consistent and accurate.

State v. Echols, 175 Wis. 2d 653, 676, 499 N.W.2d 631 (1993).

It was permissible for the court to preclude defense counsel from impeaching a witness with prior testimony. The attorney did not have a transcript of that testimony and thus could not comply with Wis. Stat. § 906.13's requirement that at the conclusion of the examination, if requested, opposing counsel be shown or given a copy of the document being used to impeach.

State v. Gustafson, 119 Wis. 2d 676, 687, 350 N.W.2d 653 (1984), *different results reached on reh'g*, 121 Wis. 2d 459, 359 N.W.2d 920 (1985).

Evidence of a witness's juvenile adjudication and of his no-contest plea in a juvenile matter was not admissible under this section or Wis. Stat. § 48.35(1)(b). A plea of no contest is not an admission against interest. *See also* Wis. Stat. § 938.35(1)(b) (eff. July 1, 1996).

State v. Lenarchick, 74 Wis. 2d 425, 451, 247 N.W.2d 80 (1976).

Counsel is entitled to all prior statements of a witness at the conclusion of the witness's testimony. But counsel must request the statements.

Chapter 22

Court Control over Witnesses; Bias of Witness

906.14 Calling and interrogation of witnesses by judge.

(1) CALLING BY JUDGE. The judge may, on the judge's own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(2) INTERROGATION BY JUDGE. The judge may interrogate witnesses, whether called by the judge or by a party.

(3) OBJECTIONS. Objections to the calling of witnesses by the judge or to interrogation by the judge may be made at the time or at the next available opportunity when the jury is not present.

Judicial Council Committee's Note (1974)

Sub. (1). This rule is consistent with Wisconsin case law, *State v. Nutley*, 24 Wis. 2d 527, 129 N.W.2d 155 (1964), *certiorari denied* 380 U.S. 918, 85 S. Ct. 912, 13 L. Ed.2d 803, and *Welter v. Wisconsin*, 380 U.S. 922, 85 S. Ct. 921, 13 L. Ed.2d 806. It is expected that this authority will be used only in the exceptional case.

Sub. (2). Wisconsin is in accord with this rule. *Breunig v. American Family Ins. Co.*, 45 Wis. 2d 536, 173 N.W.2d 619 (1970); *State v. Herrington*, 41 Wis. 2d 757, 165 N.W.2d 120 (1969); *State v. Nutley*, 24 Wis. 2d 527, 129 N.W.2d 155 (1964); *certiorari denied* 380 U.S. 918, 85 S. Ct. 912, 13 L. Ed.2d 803, and *Welter v. Wisconsin*, 380 U.S. 922, 85 S. Ct. 921, 13 L. Ed.2d 806. A judge in exercising his authority to call and examine witnesses, should not function as a partisan or advocate, *State v. Garner*, 54 Wis. 2d 100, 104, 194 N.W.2d 649, 651 (1972), *State v. Nutley*, *supra*, nor betray bias or prejudice, *State v. Driscoll*, 263 Wis. 230, 238, 56 N.W.2d 788, 791 (1953); *Komp v. State*, 129 Wis. 20, 24, 108 N.W. 46 (1906); *State v. Herrington*, *supra*, *Swonger v. Celetano*, 17 Wis. 2d 303, 308, 116 N.W.2d 117, 120 (1962), nor engage in excessive examination, *Breunig v. American Family Ins. Co.*, 45 Wis. 2d 536, 548, 173 N.W.2d 619, 626 (1970); *Reuling v. Chicago, St. P., M. & O.R. Co.*, 257 Wis. 485, 494, 44 N.W.2d 253, 258 (1950). It is expected that this authority will be used only in the exceptional case.

Sub. (3). This rule defers the requirement of a timely objection, s. 901.03(1)(a), to the next available opportunity when the jury is not present. Accord: *Benedict v. State*, 190 Wis. 266, 208 N.W. 934 (1926). The rule applies not only to objection to the fact of interrogation by the judge, but also to the manner of the examination and admission of the solicited answer. See cases cited above and *State v. Driscoll*, 263 Wis. 230, 56 N.W.2d 788 (1953).

Case Annotations

(1) Calling by Judge

(2) Interrogation by Judge

Covelli v. Covelli, 2006 WI App 121, ¶¶ 22–23, 293 Wis. 2d 707, 718 N.W.2d 260.

The trial court may use the broad latitude granted by Wis. Stat. § 906.14(2) in furtherance of its fact-finding role by questioning witnesses, but in doing so the court should not act as a partisan or advocate.

State v. Carprue, 2004 WI 111, ¶¶ 40–44, 46, 274 Wis. 2d 656, 683 N.W.2d 31.

A trial judge has the authority to call and interrogate witnesses, and such conduct will be presumed fair and impartial; however, this presumption may be overcome by proof of bias or partisanship, except in extreme cases of structural error. Nevertheless, judges should exercise restraint in questioning witnesses.

Sommers v. Friedman, 172 Wis. 2d 459, 477–78, 493 N.W.2d 393 (Ct. App. 1992).

A trial judge has the right to modify a question asked by a juror because judges are not referees at prizefights but functionaries of justice with the power to call and examine witnesses to elicit the truth. A judge need only ensure that the framing of questions to witnesses is done carefully and impartially.

State v. Wolter, 85 Wis. 2d 353, 373, 270 N.W.2d 230 (Ct. App. 1978).

The trial court must be careful not to function as a partisan or an advocate. The judge should not take any active role in trying the case for either side. The judge has a responsibility to clarify questions and answers when obvious important evidentiary matters are ignored or inadequately covered.

State v. Asfoor, 75 Wis. 2d 411, 437, 249 N.W.2d 529 (1977).

There is a fine line that divides a judge's proper interrogation of witnesses and interrogation that may appear to a jury as partisanship. A trial judge must be sensitive to this. However, the trial judge is more than a mere referee. The judge has an obligation to see to it that justice is done but must do so carefully and in an impartial manner.

(3) Objections

State v. Carprue, 2004 WI 111, ¶¶ 34–39, 46, 274 Wis. 2d 656, 683 N.W.2d 31.

The failure to timely object to the calling and interrogating of a witness by the judge outside the presence of the jury constitutes a waiver of the right to object and of any claim of error. An objection must be made at the time of alleged misconduct.

906.15 Exclusion of witnesses.

(1) At the request of a party, the judge or circuit court commissioner shall order witnesses excluded so that they cannot hear the testimony of other witnesses. The judge or circuit court commissioner may also make the order of his or her own motion.

(2) Subsection (1) does not authorize exclusion of any of the following:

(a) A party who is a natural person.

(b) An officer or employee of a party which is not a natural person designated as its representative by its attorney.

(c) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

(d) A victim, as defined in s. 950.02(4), in a criminal case or a victim, as defined in s. 938.02(20m), in a delinquency proceeding under ch. 938, unless the judge or circuit court commissioner finds that exclusion of the victim is necessary to provide a fair trial for

the defendant or a fair fact-finding hearing for the juvenile. The presence of a victim during the testimony of other witnesses may not by itself be a basis for a finding that exclusion of the victim is necessary to provide a fair trial for the defendant or a fair fact-finding hearing for the juvenile.

(3) The judge or circuit court commissioner may direct that all excluded and non-excluded witnesses be kept separate until called and may prevent them from communicating with one another until they have been examined or the hearing is ended.

Judicial Council Committee's Note (1974)

The federal rule is altered by extension to a proceeding before a court commissioner. The last sentence adds to the federal rule provisions of s. 970.03(6), allowing the judge to impose a limitation upon communication between witnesses. *Loose v. State*, 120 Wis. 115, 97 N.W. 526 (1903). The rule is consistent with Wisconsin practice and law, *Abraham v. State*, 47 Wis. 2d 44, 176 N.W.2d 349 (1970); *Ramer v. State*, 40 Wis. 2d 79, 161 N.W.2d 209 (1968), except that it makes the requested exclusion a matter of right rather than discretionary. This rule does not prevent the judge or court commissioner from requiring the non-excluded persons to be first witnesses for the respective sides pursuant to s. 906.11(1). Wigmore ss. 1841, 1869.

Authors' Note. *See* Wis. Stat. § 970.03(6) (analogous rule applies in criminal cases).

Case Annotations

Tina B. v. Richard H. (In re Guardianship of Elizabeth M.H.), 2014 WI App 123, ¶¶ 55–56, 359 Wis. 2d 204, 857 N.W.2d 432.

In a juvenile guardianship proceeding, it was not error for the court to sequester as a witness a county employee (a social worker) when there were no findings that (1) the county or the employee were parties to the action, (2) the employee was the county's designated representative, or (3) the witness's presence in the courtroom was essential to the presentation of the objecting party's case.

State v. Copeland, 2011 WI App 28, ¶¶ 14–22, 332 Wis. 2d 283, 798 N.W.2d 250.

Circuit courts have broad discretion to prevent an attorney from sharing the testimony of prior witnesses with a nonparty witness who has yet to testify, including barring an attorney from giving a witness a transcript of that testimony.

State v. Green, 2002 WI 68, 253 Wis. 2d 356, 646 N.W.2d 298.

A prosecutor did not violate a circuit court's standard sequestration order, which excluded all prosecution and defense witnesses from hearing other witnesses' testimony, when the prosecutor spoke with a witness about the witness's own testimony during a break in the trial.

Authors' Note. While this statement remains good law, the supreme court in *State v. Johnson*, 2023 WI 39, ¶ 1 n.3, 407 Wis. 2d 195, 990 N.W.2d 174, held that to the extent *Green* and other cases "can be read to permit in camera review of privately held, privileged health records in a criminal case upon a showing of materiality," that holding was expressly overruled.

State v. Evans, 2000 WI App 178, ¶¶ 4–10, 238 Wis. 2d 411, 617 N.W.2d 220.

A party seeking relief from a sequestration order has the burden of showing that the person exempted is essential. In a prosecution for sexual assault, in which the state sought to meet its burden, in part, through DNA results, the defendant failed to demonstrate that his DNA expert's presence during the state's experts' testimony was more than helpful and that he could not effectively present his case with the expert inside the courtroom to help him shape cross-examination strategies or techniques.

State ex rel. Block v. Circuit Ct., 2000 WI App 72, ¶ 10, 234 Wis. 2d 183, 610 N.W.2d 213.

An individual who was a "target" of an elections board investigation could not rely on Wis. Stat. § 906.15(1) and (2)(a) to ensure his attendance at an investigatory deposition because he was not a party within the meaning of the rule. In addition, the investigatory deposition was neither a discovery deposition nor a deposition to memorialize testimony; while Wis. Stat. § 906.15 could arguably permit attendance at the latter types of non-investigatory depositions in a pending court action, those circumstances were not present in this case.

James v. Heintz, 165 Wis. 2d 572, 583, 478 N.W.2d 31 (Ct. App. 1991).

A court cannot deny a sequestration request unless the witness fits into one of the three exempted categories under Wis. Stat. § 906.15.

State v. Bembenek, 111 Wis. 2d 617, 637, 331 N.W.2d 616 (Ct. App. 1983).

When a witness violates a sequestration order, the decision as to whether the witness should be allowed to testify is generally left to the sound discretion of the trial court. If there is no prejudice to a party in the violation, it is not error to allow the witness to testify even if the party calling the witness participated in the violation.

906.16 Bias of witness.

For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.

Judicial Council Note (2017)

This rule is adopted from the Uniform Rules of Evidence 616, which codifies *United States v. Abel*, 469 U.S. 45, 105 S. Ct. 465, 83 L.Ed.2d 450 (1984). The rule codifies the common law in Wisconsin. See *State v. Long*, 2002 WI App 114, ¶ 18, 255 Wis. 2d 729, 647 N.W.2d 884 ("Wisconsin law is in accordance with the principle set forth in *Abel*."). The committee viewed codification of the rule as useful, however, to reiterate that bias, prejudice, or interest of a witness is a fact of consequence under Wis. Stat. § 904.01. Further, the rule should make it clear that bias, prejudice, or interest is not a collateral matter, and can be established by extrinsic evidence. *State v. Williamson*, 84 Wis. 2d 370, 383, 267 N.W.2d 337, 343 (1978) ("The bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely…. The extent of the inquiry with respect to bias is a matter within the discretion of the trial court.").

Authors' Note. Cases on bias, collateral issues, and extrinsic evidence are annotated under Wis. Stat. § 906.08(2), in chapter 19, *supra*.

Chapter 23
Opinions by Lay Witnesses

907.01 Opinion testimony by lay witnesses.

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are all of the following:

(1) Rationally based on the perception of the witness.

(2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

(3) Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02(1).

Judicial Council Committee's Note (1974)

The recent Wisconsin cases are in accord with this section. The simplistic and erroneous view that lay witnesses may testify only to fact, not opinion, was rejected in *Bennett v. State*, 54 Wis. 2d 727, 735, 196 N.W.2d 704, 708 (1972), and *York v. State*, 45 Wis. 2d 550, 173 N.W.2d 693 (1970). Other Wisconsin cases are in agreement, *Milwaukee v. Berry*, 44 Wis. 2d 321, 171 N.W.2d 305 (1969); *Trible v. Tower Ins. Co.*, 43 Wis. 2d 172, 168 N.W.2d 148 (1969); *Milwaukee v. Bichel*, 35 Wis. 2d 66, 150 N.W.2d 419 (1967); *Cullen v. State*, 26 Wis. 2d 652, 133 N.W.2d 284 (1965). Note that the rule is applicable when the witness is not testifying as an expert. The rule does not allow the lay witness to testify when the subject of his testimony requires expertise. Although an experienced police officer is not as such qualified to testify as an expert as to the point of impact in an auto accident, *Milwaukee v. Bub*, 18 Wis. 2d 216, 118 N.W.2d 123 (1962), when not testifying as an expert, the officer's lay opinion of the point of impact is admissible if it meets the test of subs. (1) and (2) of this section.

Authors' Note. The Wisconsin Legislature has amended Wis. Stat. § 907.01 to conform substantially to Fed. R. Evid. 701 by creating Wis. Stat. § 907.01(3), which states that lay opinion cannot be based on scientific, technical, or specialized knowledge. *See* 2011 Wis. Act 2. A witness, properly qualified, may give both lay and expert testimony, but the expert testimony will be subject to the *Daubert* reliability test of Wis. Stat. § 907.02, as amended. *See id.*; *see also infra* ch. 24. Therefore, the last sentence of the Judicial Council Committee's note is no longer correct after the legislature added subsection (3) in 2011. *See also Brain v. Mann*, 129 Wis. 2d 447, 385 N.W.2d 227 (Ct. App. 1986).

Case Annotations

State v. Burch, 2021 WI 68, ¶¶ 28–31, 398 Wis. 2d 1, 961 N.W.2d 314, *cert. denied*, 142 S. Ct. 811 (2022).

The trial court properly exercised its discretion in admitting Fitbit step-counting evidence without expert testimony because the evidence was not so complex that the jury needed an expert to understand it.

Authors' Note. In dissent, Justice A.W. Bradley noted that this was a groundbreaking question and presented a detailed argument why expert testimony should have been required to establish the reliability of the science underlying the Fitbit technology.

Mueller v. Harry Kaufmann Motorcars, Inc., 2015 WI App 8, ¶ 35, 359 Wis. 2d 597, 859 N.W.2d 451.

A nonexpert owner may testify concerning the value of the owner's property, regardless of whether it is real estate or personal property.

State v. Magett, 2014 WI 67, ¶¶ 8, 57–60, 355 Wis. 2d 617, 850 N.W.2d 42.

In a criminal case in which a defendant has pleaded not guilty by reason of mental disease or defect (NGI), the defendant is competent to testify as to the defendant's mental condition in the responsibility phase. A lay witness, however, does not have "an unlimited, categorical right" to give opinion testimony on the issue of mental disease or defect.

State v. Small, 2013 WI App 117, ¶¶ 13–15, 351 Wis. 2d 46, 839 N.W.2d 160.

A police officer was properly allowed to offer his lay opinion as to what a person said on a recording when the officer listened to it 50–100 times, the jury listened to it, and no specialized scientific or technical equipment was used to analyze the audio, because his opinion of what was said was "rationally based" on his "perception."

State v. Echols, 2013 WI App 58, ¶¶ 25–26, 348 Wis. 2d 81, 831 N.W.2d 768.

A lay witness's testimony that the defendant only stuttered when he lied was inadmissible lay opinion because it was not helpful to a clear understanding of the witness's testimony or to the determination of a fact in issue. Moreover, a witness cannot vouch for when the defendant is being truthful, because such testimony usurps the role of the jury as the determiner of the credibility of the witnesses.

Mayberry v. Volkswagen of Am., Inc., 2005 WI 13, ¶¶ 41–42, 278 Wis. 2d 39, 692 N.W.2d 226.

An owner of property may testify as to its value, and such testimony may properly support a jury verdict for damages, even though the opinion is not corroborated or based on independent factual data, in an action for defective-vehicle damages brought under the Magnuson-Moss Warranty Act.

State v. Perkins, 2004 WI App 213, ¶¶ 20–23, 277 Wis. 2d 243, 689 N.W.2d 684.

Expert testimony is not required in every sexual assault case to establish the existence of a mental illness or deficiency rendering the victim of a sexual assault unable to appraise the victim's own conduct. Nor is expert testimony required to establish mental illness or incapacity under Wis. Stat. § 940.225(2)(c) in every case.

In this case, lay testimony of the victim's behavior allowed the jury to make a rational decision on these issues because they were within the common understanding of the jury.

Teff v. Unity Health Plans Ins. Corp., 2003 WI App 115, ¶¶ 23–28, 265 Wis. 2d 703, 666 N.W.2d 38.

The trial court properly exercised its discretion in determining that the business owners were competent to testify on the value of their businesses for purposes of establishing lost revenues.

Ansani v. Cascade Mountain, Inc., 223 Wis. 2d 39, 57–58, 588 N.W.2d 321 (Ct. App. 1998).

A nonexpert witness's testimony regarding the placement of a racing gate at an accident site on a ski hill, in contrast to racing gate placements that the witness had observed at other ski hills, was permissible opinion testimony by a lay witness under Wis. Stat. § 907.01. The witness did not offer an opinion that the placement in question was dangerous, only that it was unique; his opinion was based on his personal perception; and the testimony was relevant to the witness's credibility as to his memory.

Wester v. Bruggink, 190 Wis. 2d 308, 318, 527 N.W.2d 373 (Ct. App. 1994).

A police officer who investigated an accident scene was not qualified to offer a lay opinion about the point of impact between two cars, because the officer's conclusions were not based on his perception. However, because of the officer's training and experience, he qualified as an expert and his opinions were admissible under Wis. Stat. § 907.02.

Authors' Note. This case substantially narrowed the holding in *Vonch v. American Standard Insurance Co.*, 151 Wis. 2d 138, 442 N.W.2d 598 (Ct. App. 1989). Since the *Wester* decision, it is doubtful whether a police officer can be allowed under Wis. Stat. § 907.01 to testify about point of impact. This conclusion was reinforced by the 2011 amendment to Wis. Stat. § 907.01. *See* 2011 Wis. Act 2.

Pattermann v. Pattermann, 173 Wis. 2d 143, 152, 496 N.W.2d 613 (Ct. App. 1992).

In determining whether to receive a lay opinion, a trial court may consider the witness's expertise gained from practical experience. In a case concerning liability for a bite by a dog (a chow chow), there was insufficient foundation to justify admitting the witness's lay opinion that chows

as a breed are dangerous because the witness's only familiarity with the breed was that a neighbor had them and "knew" them to be unpredictable.

Lievrouw v. Roth, 157 Wis. 2d 332, 352, 459 N.W.2d 850 (Ct. App. 1990).

A lay witness was allowed to testify that he believed he faced an emergency because that was not a legal concept for which a definitional instruction was required but was based on the witness's perception of the events as they were unfolding.

State v. Romero, 147 Wis. 2d 264, 278, 432 N.W.2d 899 (1988).

The testimony of a social worker and an investigating police officer that a complainant was honest and truthful was not admissible as lay opinion. The testimony was not helpful to the jury. Rather, it was intended to usurp the jury's role. The credibility of a witness is left to the jury's judgment. No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth.

Authors' Note. See also *State v. Maday*, 2017 WI 28, ¶ 3, 374 Wis. 2d 164, 892 N.W.2d 611, annotated in chapter 24, *infra*.

Brain v. Mann, 129 Wis. 2d 447, 454, 385 N.W.2d 227 (Ct. App. 1986).

An expert's qualification depends on experience, not on more formal attributes such as professional licensing. Thus, an officer who had police academy training and practical experience in accident investigations was qualified as an expert on certain matters, such as the safe speed in a construction zone. However, it is important to distinguish among the matters on which the officer is being asked to testify, since a police officer is probably not qualified to testify on matters concerning accident reconstruction. The key to making such a determination in the absence of specific education or licensing is whether the matter is one that a purported expert regularly considers in the ordinary course of the expert's duties and on which the expert has had some training and experience.

Authors' Note. This case casts substantial doubt on whether the last sentence of the Judicial Council Committee's Note to Wis. Stat. § 907.01 is a correct statement of the law. The 2011 amendment reinforces this conclusion.

Town of Fifield v. State Farm Mut. Auto. Ins. Co., 119 Wis. 2d 220, 232, 349 N.W.2d 684 (1984).

A corporate officer, including a town official, may give opinions as to value because corporations, municipal or otherwise, are persons under the law that can speak only through their officers.

State v. Dalton, 98 Wis. 2d 725, 731, 298 N.W.2d 398 (Ct. App. 1980).

To be admissible, lay opinion must be based on rational perception and be helpful to a determination of a fact issue. As such, a psychiatrist could not give a "lay opinion" about whether a person had the intent to kill at the time the person committed the homicide.

Wagner v. State, 76 Wis. 2d 30, 40, 250 N.W.2d 331 (1977).

A lay witness may give an opinion that a car was traveling at a "high degree of speed" although the exact speed was not established.

Heiting v. Heiting, 64 Wis. 2d 110, 118, 218 N.W.2d 334 (1974).

Relatives or close associates may testify as to their personal observations of objective symptoms but should not be permitted to give medical opinions as to the nature of the ailment or its cause.

See also ....

Perpignani v. Vonasek, 139 Wis. 2d 695, 737, 408 N.W.2d 1 (1987) (stating general rule that nonexpert owner of real or personal property may testify concerning its value; any weight attached to that testimony is for trier of fact)

Wilberscheid v. Wilberscheid, 77 Wis. 2d 40, 48, 252 N.W.2d 76 (1977) ("An owner is competent to give opinion evidence on value.")

Chapter 24
Expert Opinions

907.02 Testimony by experts.

(1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

(2) Notwithstanding sub. (1), the testimony of an expert witness may not be admitted if the expert witness is entitled to receive any compensation contingent on the outcome of any claim or case with respect to which the testimony is being offered.

Judicial Council Committee's Note (1974)

Fear of encroachment upon the function of the trier of the fact prompted the negative view that the propriety of expert testimony was dependent upon the need of the trier of the fact for enlightenment. More rational is an affirmative approach to the use of expert testimony predicated upon whether such testimony will assist the trier of the fact to understand the evidence or to determine a fact in issue. With such a test, expert testimony will usually be admissible and will only be excluded if superfluous and a waste of time. Such an approach was approved in *State v. Johnson*, 54 Wis. 2d 561, 196 N.W.2d 717 (1972); *Rabata v. Dohner*, 45 Wis. 2d 111, 124, 172 N.W.2d 409, 415 (1969); *Jacobson v. Greyhound Corp.*, 29 Wis. 2d 55, 138 N.W.2d 133 (1965); *Kreyer v. Farmers' Co-op. Lumber Co.*, 18 Wis. 2d 67, 117 N.W.2d 646 (1962); *Anderson v. Eggert*, 234 Wis. 348, 291 N.W. 365 (1940). The rule is less clearly stated in *Cramer v. Theda Clark Memorial Hospital*, 45 Wis. 2d 147, 151, 172 N.W.2d 427, 429, 40 A.L.R.3d 509 (1969), and *Kreklow v. Miller*, 37 Wis. 2d 12, 22, 154 N.W.2d 243, 248, 29 A.L.R.3d 1126 (1967). Wisconsin standards of expert qualification are in accord, *State v. Johnson*, *supra*; *Netzel v. State Sand & Gravel Co.*, 51 Wis. 2d 1,186 N.W.2d 258 (1971); *Cramer v. Theda Clark Memorial Hospital*, *supra*. S. 906.04 requires an interpreter to qualify as an expert.

Authors' Note. Wis. Stat. § 907.02 conforms to Fed. R. Evid. 702 and adopts the *Daubert* reliability requirement both as to the principles and methods used by an expert witness and as to the application of the principles and methods by the witness to the facts of the case. *See* 2011 Wis. Act 2 (eff. Feb. 1, 2011); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *see also* Fed. R. Evid. 702 advisory committee's note—2000.

A *Daubert* gatekeeping decision is based on the preponderance of the evidence. Hearsay evidence may be considered. An evidentiary hearing is not required, and the judge's decision may be made before or during the trial. The judge has the discretion to select the factors that govern reliability.

The 2011 rule change adopting *Daubert* is a significant change in Wisconsin law, and caution should be used in applying earlier cases.

Wis. Stat. § 907.02(2), created by 2011 Wis. Act 2, does not have a counterpart in the Federal Rules of Evidence.

Case Annotations

State v. Mader, 2023 WI App 35, ¶¶ 32–40, 408 Wis. 2d 632, 993 N.W.2d 761 (review denied).

In this sexual assault case, the testimony of a retired sexual-abuse therapist and a sheriff's investigator about the statistical rarity of false reporting impermissibly vouched for the victim's credibility. Both witnesses testified to a greater-than-99% rate of truthful reporting of sexual assault in their experience, and one recounted his extensive personal interactions with the victim. These circumstances moved the evidence from general statistical testimony to impermissible vouching.

Vanderventer v. Hyundai Motor Am., 2022 WI App 56, ¶¶ 53–79, 405 Wis. 2d 481, 983 N.W.2d 1 (review denied).

This was a products-liability case alleging enhanced injuries as a result of a defective driver's seat. The court of appeals made a comprehensive review of *Daubert* law in Wisconsin. It affirmed the trial court's admission of the plaintiff's opinion evidence from a mechanical engineer regarding a design defect in the driver's seat and, from the same engineer and from the plaintiff's treating neurosurgeon, regarding the causal link between that defect and the plaintiff's spinal fracture. While *Daubert* cases are highly fact specific, the court reaffirmed the following principles: (1) Appellate review is deferential: if the trial court applied the proper legal standard under Wis. Stat. § 907.02(1), the appellate court will review under the erroneous-exercise-of-discretion standard. (2) The goal in assessing reliability of the expert's methodology is to ensure the same rigor that characterizes the expert's practice in the field. (3) While the cases provide factors that a court can use in assessing reliability, the trial court is given "considerable leeway." (4) As long as an opinion is not "merely subjective belief or unsupported speculation 'dressed up in the guise of expert opinion,'" criticism of the opinion is generally a question of weight, not admissibility.

State v. Ochoa, 2022 WI App 35, ¶¶ 31–40, 404 Wis. 2d 261, 978 N.W.2d 501 (review denied), *cert. denied*, 143 S. Ct. 1068 (2023).

In a homicide case in which the defendant claimed self-defense, the trial court properly excluded testimony of three defense experts after a *Daubert* hearing. The trial court had reasonable concerns about (1) the reliability of the opinions of a firearms expert on crime-scene reconstruction and bullet trajectory, (2) the relevance of the opinions of a Spanish interpreter on the slang meaning of certain phrases, and (3) the reliability and relevance of opinions of an expert on use-of-deadly-force principles whose testimony was based in part on the excluded firearms expert's opinions.

State v. Hogan, 2021 WI App 24, ¶¶ 26, 33, 397 Wis. 2d 171, 959 N.W.2d 658.

In ruling on the admissibility of nonscientific, experienced-based testimony, "the trial court is required to determine, by a preponderance of the evidence and according to whichever criteria it deems appropriate, that the proffered expert testimony is based on adequate facts and a sound methodology and is thus sufficiently reliable to go before a jury." An expert need not link the expert's experience to each specific conclusion to satisfy this standard. Rather, an expert simply must explain how the expert's overall training and experience led to the expert's conclusions.

In this prosecution, the trial court properly exercised its discretion in allowing a longtime police detective to testify as an expert about trends in human trafficking, including traffickers' methods and characteristics as well as victims' common characteristics.

State v. Dobbs, 2020 WI 64, ¶¶ 31, 43–51, 392 Wis. 2d 505, 945 N.W.2d 609.

In determining the admissibility of exposition testimony, in which the expert provides an educational lecture on general principles, the trial court must consider (1) whether the expert is qualified; (2) whether the testimony will address a subject matter on which the fact-finder can be assisted by an expert; (3) whether the testimony is reliable; and (4) whether the testimony will "fit" the facts of the case. The trial court correctly excluded exposition testimony of a defense expert called to testify about police interrogation techniques and factors that can contribute to false confessions without directly opining on whether those techniques and factors led the defendant to give a false confession. The defendant was not subject to most of the coercive techniques described by the expert, nor did the defendant have most of the characteristics the expert said would predispose someone to falsely confess if coercive techniques were used.

State v. Bucki, 2020 WI App 43, ¶ 2, 393 Wis. 2d 434, 947 N.W.2d 152.

Canine scent investigation evidence is admissible when the handler providing the testimony demonstrates reliable principles and methods for the scent investigation. The admissibility of canine scent evidence is not conditioned on physical or forensic evidence corroborating the dogs' behaviors that signal a pertinent scent detection.

State v. Jones (In re Commitment of Jones), 2018 WI 44, ¶¶ 23, 25, 28–36, 381 Wis. 2d 284, 911 N.W.2d 97.

Expert testimony regarding results of actuarial screening tools to measure risk of reoffending was properly admitted in a Wis. Stat. ch. 980 proceeding. Objections to the evidence went to weight of the evidence rather than its admissibility.

State v. Maday, 2017 WI 28, ¶ 3, 374 Wis. 2d 164, 892 N.W.2d 611.

In a prosecution for sexual assault of a child, expert testimony regarding a cognitive forensic interview of a child was admissible when it (1) was limited to objective indications of dishonesty, (2) did not include a subjective opinion regarding the witness's honesty, and (3) might have assisted the jury. The testimony did not violate the *Haseltine* rule, which prohibits a witness (expert or otherwise) from expressing a belief that another competent witness is being truthful. *See State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

Seifert v. Balink, 2017 WI 2, ¶¶ 58–86, 372 Wis. 2d 525, 888 N.W.2d 816.

Experience-based testimony may be admitted under the reliability standard of *Daubert* if the witness's methodology is reasonably applied to the facts of the case.

Bayer v. Dobbins, 2016 WI App 65, ¶ 36, 371 Wis. 2d 428, 885 N.W.2d 173.

The circuit court erred in finding expert opinion testimony inadmissible under *Daubert* by reason that experts disagreed regarding the theory of maternal forces of labor as the cause of birth injuries. The ultimate determinations of credibility and accuracy of expert opinions are for the jury, not the court.

State v. Cameron, 2016 WI App 54, ¶¶ 12–16, 370 Wis. 2d 661, 885 N.W.2d 611.

A circuit court need not, sua sponte, conduct a *Daubert* admissibility analysis of scientific evidence when counsel does not object to its admission unless there is an issue of obvious constitutional dimension that requires exclusion under the plain-error doctrine.

State v. Chitwood, 2016 WI App 36, ¶¶ 34, 45–50, 369 Wis. 2d 132, 879 N.W.2d 786.

The drug recognition evaluation protocol used by law enforcement officers to determine whether a person is under the influence of drugs or alcohol is subject to the evidentiary rules regarding expert opinions, including the application of *Daubert*. In a prosecution for operating a motor vehicle under the influence of drugs, an officer's opinion based on a partial drug recognition evaluation may be admissible as long the officer has completed enough of the protocol's 12 steps for the opinion to be sufficiently reliable.

State v. Smith, 2016 WI App 8, ¶¶ 3, 9–10, 366 Wis. 2d 613, 874 N.W.2d 610.

A social worker's opinion testimony regarding reactive behaviors among child abuse victims was sufficiently reliable to satisfy *Daubert*, despite not fitting neatly within *Daubert*'s five-factor test. The circuit court correctly relied on other factors demonstrating indicia of reliability, including that the witness had sufficient experience, knowledge, skill, and training and that other *Daubert* jurisdictions had allowed similar testimony.

State v. Giese, 2014 WI App 92, ¶¶ 18, 23, 356 Wis. 2d 796, 854 N.W.2d 687.

In a prosecution for operating a motor vehicle while intoxicated, expert testimony on retrograde extrapolation of a defendant's blood alcohol concentration was admissible under *Daubert* as a widely accepted methodology in the forensic toxicology field. *Daubert* requires that expert opinion be based on a reliable foundation and be relevant to material issues. *Daubert* does not preclude expert opinion simply because there are competing scientific theories. The defendant's objections to the expert's assumptions were properly addressed by cross-examination rather than by exclusion of the evidence because the accuracy of the facts relied on by the expert and determinations of credibility are issues for the jury, not the court.

State v. Kandutsch, 2011 WI 78, ¶¶ 26–51, 336 Wis. 2d 478, 799 N.W.2d 865.

The technology underlying electronic monitoring devices and the reports generated from them are within the comprehension of the average juror, provided such reports are authenticated and a foundation laid that the process produces accurate results.

BV/B1, LLC v. InvestorsBank, 2010 WI App 152, ¶¶ 28–30, 330 Wis. 2d 462, 792 N.W.2d 622.

Plain and unambiguous contract language does not require scientific, technical, or other specialized knowledge to assist the trier of fact.

State v. Kleser, 2010 WI 88, ¶¶ 98–103, 328 Wis. 2d 42, 786 N.W.2d 144.

The principles articulated in *State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), and *State v. Jensen*, 147 Wis. 2d 240, 432 N.W.2d 913 (1988), which generally prohibit an expert from "vouching" for or testifying as to the truthfulness of a witness, apply in a reverse-waiver hearing for a juvenile who is subject to original adult-court jurisdiction.

There is no requirement that an expert explicitly testify that the expert believes a person is telling the truth for the expert's opinion to constitute improper vouching testimony. Nor is the *Haseltine* rule restricted to cases in which the person who is vouched for testifies.

Racine Cnty. v. Oracular Milwaukee, Inc., 2010 WI 25, ¶¶ 28–33, 323 Wis. 2d 682, 781 N.W.2d 88.

The principle that expert testimony is not generally required to prove a party's negligence applies equally to a breach-of-contract action arising out of a contract for services. Expert testimony is not necessary when the issue is within the realm of ordinary experience of the average trier of fact. Only complex and esoteric issues require the presentation of expert testimony.

State v. Krueger, 2008 WI App 162, ¶¶ 9–19, 314 Wis. 2d 605, 762 N.W.2d 114.

Opinion testimony in a child sexual-assault case regarding the typical signs, symptoms, or behavior of like-aged children who are being coached or manipulated into making allegations of abuse, along with testimony that the child in question exhibits none or few of the signs or symptoms, may be permissible under this section. Such opinion testimony, however, cannot include a determination of the credibility of the child. In assessing the child's testimony in this case, the social worker's observation that the child could not have recounted the events "unless it was something that she had experienced" went too far. That was tantamount to an opinion that the child was telling the truth.

Maynard Steel Casting Co. v. Sheedy, 2008 WI App 27, ¶¶ 26–29, 307 Wis. 2d 653, 746 N.W.2d 816.

In a dispute concerning the reasonableness of attorney fees, expert testimony is not required. The trial court, based on experience, may be equipped to evaluate that issue without resort to expert evidence.

State v. Van Buren, 2008 WI App 26, ¶¶ 9–14, 307 Wis. 2d 447, 746 N.W.2d 545.

In a criminal prosecution for possession of child pornography, in the absence of any evidence suggesting the photographs are not real, expert testimony is not required to establish the reality of the photographs.

State v. Shomberg, 2006 WI 9, ¶¶ 13–17, 288 Wis. 2d 1, 709 N.W.2d 370.

In a prosecution for second-degree sexual assault, when the critical evidence supporting the conviction was eyewitness identification of the fleeing assailant, the circuit court did not erroneously exercise its discretion by denying the defendant's request to present expert testimony on the factors that may erroneously influence a witness's ability to identify a stranger, because the factors to be testified to were in the common knowledge of the trier of fact. Counsel was unable to articulate satisfactorily for the court the basis on which the factors influencing the reliability of eyewitness identification would assist the trier of fact.

Authors' Note. The circuit court's decision to exclude the expert testimony was made in 2002. The supreme court noted that this decision may have limited future applicability in that, since 2002, much has been learned about the processes and limitations of memory and the inherent difficulties of eyewitness identification, especially in simultaneous lineups. The *Shomberg* case was tried to the court, and the presiding judge had reviewed the expert's report in making the decision to exclude.

Walker v. Ranger Ins. Co., 2006 WI App 47, ¶¶ 13–14, 289 Wis. 2d 843, 711 N.W.2d 683.

The issue in this case was whether a propane gas supplier acted negligently when it disconnected propane to an absent residential customer in the winter without notifying the owner, resulting in property damage. The circuit court erroneously exercised its discretion in ruling that the gas

company could call an expert to testify regarding the standard of care owed according to internal propane industry standards when a company disconnected propane at a residence because the issue in controversy did not require an understanding of the inner workings of the industry.

Brown Cnty. v. Shannon R. (In re Termination of Parental Rts. to Daniel R.S.), 2005 WI 160, ¶¶ 39–52, 286 Wis. 2d 278, 706 N.W.2d 269.

In a termination of parental rights dispute, the circuit court improperly denied the parent's offer of expert psychological testimony that the parent was substantially likely to be able to meet certain conditions that might have defeated the termination request. The circuit court erroneously exercised its discretion by

1. Not considering all the relevant facts (the court did not consider the expert's experience, training, and review of the material);
2. Not applying the correct legal standard (the court failed to recognize that courts ordinarily allow psychologists to opine about future behavior); and
3. Failing to demonstrate a rational process to reach a reasonable conclusion (the court applied its admissibility decision inconsistently because it permitted similar evidence from the petitioner-county's experts).

State v. Stank, 2005 WI App 236, ¶ 42, 288 Wis. 2d 414, 708 N.W.2d 43.

The type of "knowledge" required for admissibility of expert testimony does not depend on scientific, technical, or academic training. Any specialized knowledge beyond the ken of the average person is the test. Knowledge gained from general experience alone can be the basis for an admissible expert opinion.

Carney-Hayes v. Northwest Wis. Home Care, Inc., 2005 WI 118, ¶¶ 5, 61, 284 Wis. 2d 56, 699 N.W.2d 524.

Subject to the compelling need exception recognized in *Burnett v. Alt* and *Glenn v. Plante*, a medical witness who is unwilling to testify as an expert cannot be forced to give the witness's opinion of the standard of care applicable to another person or an opinion of the treatment provided by another person. Unless the unwilling witness is alleged to have caused injury to the plaintiff by the witness's own medical negligence, the witness need not give an opinion on the standard of care of the witness's own conduct.

The court should assure that any medical witness from whom expert opinion is required is qualified to testify as an expert witness under Wis. Stat. § 907.02.

Arents v. ANR Pipeline Co., 2005 WI App 61, ¶¶ 17–18, 281 Wis. 2d 173, 696 N.W.2d 194.

The primary guiding principle in determining the admissibility of expert evidence is whether the opinions are relevant, and not speculative, remote, or a waste of time.

A real estate value expert may testify about fear of a gas pipeline affecting the after-taking value of condemned land if the expert can successfully draw a nexus between the fear and the fair market value of the property being taken.

State v. Perkins, 2004 WI App 213, ¶¶ 20–23, 277 Wis. 2d 243, 689 N.W.2d 684.

Expert testimony is not required in every sexual-assault case to establish the existence of a mental illness or deficiency rendering the victim unable to appraise the victim's conduct. Nor is expert testimony required to establish mental illness or incapacity under Wis. Stat. § 940.225(2)(c) in every case.

In this case, lay testimony of the victim's behavior allowed the jury to make a rational decision on these issues because they were within the common understanding of the jury. *See generally supra* ch. 23 (opinions by lay witnesses).

State v. Walters, 2004 WI 18, ¶¶ 24–25, 42–43, 269 Wis. 2d 142, 675 N.W.2d 778.

The admissibility of *Richard A.P.* evidence, comparing personality characteristics of the defendant and known sex offenders for the purpose of determining whether the defendant committed the charged crime, is subject to the sound discretion of the circuit court.

The circuit court did not erroneously exercise its discretion in excluding such testimony based on a Wis. Stat. § 904.03 balancing analysis and the conclusion that the low probative value was outweighed by the dangers of such evidence.

State v. Rizzo, 2003 WI App 236, ¶ 19, 267 Wis. 2d 902, 672 N.W.2d 162.

The defendant failed to demonstrate a compelling need for a pretrial psychological examination of the victim pursuant to *State v. Maday*, 179 Wis. 2d 346, 507 N.W.2d 365 (Ct. App. 1993), because the defendant's expert could develop opinion testimony, without an examination or interview, that would counter the state's *Jensen* evidence of consistencies between the child sexual assault complainant's behavior and common behaviors of known sexual-assault victims.

State v. Treadway (In re Commitment of Treadway), 2002 WI App 195, ¶¶ 23–31, 257 Wis. 2d 467, 651 N.W.2d 334.

In a commitment proceeding to determine whether an individual was a sexually violent person, a probation officer was qualified by relevant experience and training to render an opinion on whether the individual would reoffend. It was not necessary that this testimony be reserved to psychologists or mental health specialists.

Enea v. Linn, 2002 WI App 185, 256 Wis. 2d 714, 650 N.W.2d 315.

In a medical malpractice action, even though the plaintiff's liability expert, an obstetrician-gynecologist, was not qualified to diagnose the exact nature of the plaintiff's neurological injury, he was still qualified to render an opinion as to what caused the injury.

Paulson v. Allstate Ins. Co., 2002 WI App 168, ¶ 51, 256 Wis. 2d 892, 649 N.W.2d 645, *rev'd on other grounds*, 2003 WI 99, 263 Wis. 2d 520, 665 N.W.2d 744.

In a property damage claim, because of the age of the vehicle and the severity of the crash, the vehicle owner's testimony about the cause of the property damage was sufficient. No expert testimony was necessary.

State v. St. George, 2002 WI 50, ¶¶ 48–49, 53–55, 252 Wis. 2d 499, 643 N.W.2d 777.

In a criminal action in which the admission of a defendant's expert testimony is challenged and the defendant asserts that it is a constitutional necessity to present a defense, the court must consider not only whether specialized knowledge will assist the trier of fact, but also whether the exclusion of the expert opinion evidence deprives the defendant of that constitutional right.

For the defendant to establish a constitutional right to the admissibility of the proffered expert testimony, the defendant must satisfy a two-part inquiry, which will enable a trial court to determine the defendant's interest in admitting the evidence and whether the evidence is clearly central to the defense and the exclusion of the evidence is arbitrary and disproportionate to the purpose of the rule of exclusion, so that the exclusion undermines fundamental elements of the defense.

To satisfy the first part of the test, the defendant must show each of the following four factors through an offer of proof:

1. The testimony of the expert met the standards of Wis. Stat. § 907.02 governing the admission of expert testimony.
2. The expert witness's testimony was clearly relevant to a material issue in the case.
3. The expert witness's testimony was necessary to the defendant's case.
4. The probative value of the testimony of the defendant's expert witness outweighed its prejudicial effect.

If the defendant successfully satisfies these four factors to establish a constitutional right to present the expert testimony, the trial court must then consider whether the defendant's right to present the proffered evidence is nonetheless outweighed by the state's compelling interest to exclude the evidence.

State v. Delgado, 2002 WI App 38, ¶¶ 8–9, 250 Wis. 2d 689, 641 N.W.2d 490.

In a case of sexual assault involving a minor victim, when the state seeks to introduce expert testimony of the victim's post-assault behavior, the following rules guide the scope of that testimony:

1. The expert witness can offer opinion testimony only if it complies with Wis. Stat. § 907.02.
2. The testimony can include opinions regarding symptomatology common to child sexual-assault victims.
3. The testimony can include a description of the symptoms exhibited by the victims.
4. The testimony can include the expert's opinion as to whether the particular victim's behavior is consistent with behavior of sexual-assault victims in general.

In these cases, however, an expert cannot vouch for the credibility of the victim. Accordingly, the expert, for example, cannot testify:

1. That the victim is "being totally truthful"; and
2. That there is "no doubt whatsoever" that the accuser was a victim of moral turpitude.

State v. Stephen T. (In re Stephen T.), 2002 WI App 3, ¶¶ 1, 20–21, 250 Wis. 2d 26, 643 N.W.2d 151.

Expert testimony concerning a prepubescent's sexual immaturity was relevant to the issue of the formation of intent to become sexually aroused or gratified.

State v. Sprosty (In re Commitment of Sprosty), 2001 WI App 231, ¶¶ 26–29, 248 Wis. 2d 480, 636 N.W.2d 213.

In a hearing to determine whether an individual was a sexually violent person under Wis. Stat. § 980.08(4), the fact that a witness was not a "licensed psychologist," as defined by former Wis. Admin. Code § HFS 99.03 (renumbered in 2008 as Wis. Admin. Code § DHS 99.03), did not preclude that person's qualification as an expert witness under Wis. Stat. § 907.02.

State v. Davis, 2002 WI 75, ¶¶ 3, 40, 254 Wis. 2d 1, 645 N.W.2d 913.

When a defendant gives notice of intent to introduce *Richard A.P.* evidence (a showing through an expert that the defendant did not exhibit character traits consistent with a sexual disorder), the court may compel the defendant to undergo an examination by a state-selected expert only if the defendant's expert is expected to testify, either implicitly or explicitly, to facts surrounding the crime. The introduction of such testimony, relating to facts surrounding the crime, constitutes a waiver by the defendant of the right against self-incrimination.

Martindale v. Ripp, 2001 WI 113, ¶¶ 44–73, 246 Wis. 2d 67, 629 N.W.2d 698.

In a personal injury action arising from a rear-end automobile collision, it was reversible error to exclude plaintiff's expert on temporomandibular joints (TMJs) from testifying as to the whiplash mechanism that prompted the expert to conclude the injury was caused by the whiplash.

Green v. Smith & Nephew AHP, Inc., 2001 WI 109, ¶¶ 86–95, 245 Wis. 2d 772, 629 N.W.2d 727.

In a latex allergy case, it was error to admit an expert witness's opinion when the purported expert, who was not a medical doctor, disavowed being qualified to testify concerning the safety of different protein levels in latex gloves, and the court made no findings to the contrary nor did the record contain any evidence to the contrary.

Authors' Note. This case arguably raised the bar in Wisconsin as to who is qualified to testify as an expert witness, as pointed out in Chief Justice Abrahamson's concurrence (*Green*, 2001 WI 109, ¶¶ 105–113, 245 Wis. 2d 772 (Abrahamson, C.J., concurring)). However, the precedential value of this case regarding the qualification of an expert witness is weak. Part IV of the lead opinion, which discussed the qualification of an expert witness, lacked a clear majority. Two justices concurred in the opinion, but did not agree with Part IV, and two justices dissented from the entire opinion.

Wal-Mart Stores, Inc. v. LIRC, 2000 WI App 272, ¶¶ 16–19, 240 Wis. 2d 209, 621 N.W.2d 633.

Expert testimony is required to establish a causal link between a psychiatric disorder and a demonstrated behavior because the symptoms and manifestations of psychiatric disorders are inherently complex and technical and not within the realm of ordinary experience.

Hennig v. Ahearn, 230 Wis. 2d 149, 181–82, 601 N.W.2d 14 (Ct. App. 1999).

An attorney practicing in the field of business law was qualified to testify as an expert regarding the customs of business executives in the negotiation of an executive compensation agreement, even though the expert had not worked extensively in the capacity of a business executive. It is not necessary that an expert have personally performed the activities at issue for the expert to give an opinion, if the expert is otherwise qualified by knowledge, skill, experience, training, or education.

State v. Doerr, 229 Wis. 2d 616, 622–27, 599 N.W.2d 897 (Ct. App. 1999).

Prosecutors who intend to rely on a preliminary breath test result in a non-OWI case must present expert evidence of the device's scientific accuracy and reliability and prove compliance with accepted scientific methods as a foundation for the admission of the test results.

State v. Zivcic, 229 Wis. 2d 119, 127–29, 598 N.W.2d 565 (Ct. App. 1999).

A law enforcement officer trained in administering and evaluating the horizontal gaze nystagmus (HGN) field sobriety test may be found qualified as an expert to testify regarding the test results.

Thiery v. Bye, 228 Wis. 2d 231, 245, 597 N.W.2d 449 (Ct. App. 1999).

Expert testimony is required to establish the standard of care and breach of duty in a malpractice action, unless the breach either is so obvious that it can be determined as a matter of law or is within the ordinary knowledge of a layperson.

State v. Kienitz, 227 Wis. 2d 423, 441, 597 N.W.2d 712 (1999).

The trier of fact is free to weigh conflicting expert opinions and decide which are more reliable. In so doing, the fact-finder may accept or reject the testimony of any expert, including accepting only parts of an expert's testimony.

State v. Watson, 227 Wis. 2d 167, 186–91, 595 N.W.2d 403 (1999).

Expert opinion is admissible if the expert has specialized knowledge that is relevant because it will assist the trier of fact to understand the evidence or determine a fact in issue. That a lay witness of ordinary intelligence may also understand the subject matter does not mean the expert's opinion would not be of assistance.

Burnett v. Alt, 224 Wis. 2d 72, 83–84, 589 N.W.2d 21 (1999).

A question asks for expert opinion if it requires scientific, technical, or other specialized knowledge, not within the range of ordinary training or intelligence. Whether a gush of blood in a patient with a history of term pregnancy is normal or abnormal is such a question.

State v. Richard A.P., 223 Wis. 2d 777, 793–95, 589 N.W.2d 674 (Ct. App. 1998).

Expert opinion testimony, as to whether an individual's character traits are consistent with sexual deviance, is appropriate when offered to assist a jury in determining the likelihood that the individual had sexual contact with a child.

State v. Mayer, 220 Wis. 2d 419, 427–30, 583 N.W.2d 430 (Ct. App. 1998).

Expert witness testimony regarding battered woman's syndrome and an alleged domestic abuse victim's recantation is permissible when there is sufficient evidence that the alleged victim has the characteristics of the syndrome, and when the expert testimony is relevant. In deciding whether to admit such testimony, the trial court should also determine whether the witness is properly qualified as an expert and whether the testimony will assist the trier of fact; however, the court is not required to make these determinations sua sponte.

Ludwig v. Dulian, 217 Wis. 2d 782, 793–94, 579 N.W.2d 795 (Ct. App. 1998).

Expert testimony is not required to prove the cause of a person's injuries when the question of causation is "within the realm of ordinary experience." In such circumstances, an injured party may testify as to the cause of that party's own injuries on the basis of personal knowledge or

experience.

Majorowicz v. Allied Mut. Ins. Co., 212 Wis. 2d 513, 532, 569 N.W.2d 472 (Ct. App. 1997).

Expert testimony was not required to prove punitive damages in a bad-faith case.

State v. Ross, 203 Wis. 2d 66, 81–82, 552 N.W.2d 428 (Ct. App. 1996).

An expert witness's opinion is not admissible if it gives an opinion as to the truthfulness of another witness's testimony. However, an expert medical opinion, including that of a nurse, concerning whether an alleged sexual-assault victim's physical condition at the time of treatment was consistent with the victim's statement that her vagina had been penetrated is admissible.

State v. Schaller, 199 Wis. 2d 23, 30–37, 544 N.W.2d 247 (Ct. App. 1995).

Generally, when a defendant is prevented from presenting "examining expert" testimony, and the state is able to offer such testimony from its own experts, the defendant is deprived of a level playing field. However, in this case, the prosecution witnesses' testimony that victims of domestic abuse commonly recant accusations of abuse was insufficient to warrant the defendant's request to conduct an independent psychological examination of the victim.

The state's witnesses did not conduct a psychological examination or interview with the victim, and the state did not place the victim's mental condition in issue. Furthermore, the state's witnesses did not testify that their observations of the victim were consistent with the behavior of abuse victims—this was left solely for the jury to determine. The only testimony discussed the behavior of abuse victims generally; the defendant could have likewise provided expert testimony on this topic without need for conducting an independent clinical examination of the victim.

Weiss v. United Fire & Cas. Co., 197 Wis. 2d 365, 382–87, 541 N.W.2d 753 (1995).

When an insurer's breach of its duty of good faith and fair dealing toward its insured involves facts and circumstances within the common knowledge of an average juror, the insured need not provide expert testimony to establish bad faith. Thus, when a plaintiff introduces evidence of the insurer's incomplete or inadequate investigation, an average juror can independently determine whether the insurer acted in bad faith without the need for expert testimony.

State v. Brewer, 195 Wis. 2d 295, 306, 536 N.W.2d 406 (Ct. App. 1995).

The relationship between "items generally possessed by drug dealers"—in this case, gang graffiti—and drug activity is an area of specialized knowledge and, therefore, a proper topic for expert testimony by properly qualified narcotics officers.

State v. Donner, 192 Wis. 2d 305, 317–18, 531 N.W.2d 369 (Ct. App. 1995).

In an OWI prosecution, an expert on alcohol metabolism was allowed to testify that all persons with a blood alcohol concentration of .09% are impaired to some degree. The witness was qualified to give this opinion by her background in the area of alcohol metabolism, particularly her experience conducting "dosing" experiments in which the impairment levels of persons who have ingested large amounts of alcohol are measured.

Wester v. Bruggink, 190 Wis. 2d 308, 321, 527 N.W.2d 373 (Ct. App. 1994).

In determining whether a person is qualified to testify about the point of impact in an automobile accident, the trial court should compare the technical and scientific expertise of the prospective witness with the complexity of the case. Here, a police officer was qualified as an expert to testify about the point of impact.

State v. Richardson, 189 Wis. 2d 418, 426–31, 525 N.W.2d 378 (Ct. App. 1994).

When the defense of battered woman syndrome is raised, expert testimony is admissible to compare the defendant with profiles of battered women to provide a context for the jury to understand why the defendant might perceive herself to be in imminent danger at the time she committed the alleged crime and to assess whether such a belief would have been reasonable. Such testimony can include whether the defendant exhibited such characteristics as low self-esteem, social isolation, and "learned helplessness," and whether the defendant reported a history of abuse.

An expert cannot give an opinion on whether, at the time of the commission of the crime, the defendant held a belief that she was in danger or as to whether that belief was reasonable.

Wingad v. John Deere Co., 187 Wis. 2d 441, 450–53, 523 N.W.2d 274 (Ct. App. 1994).

The plaintiff does not have the burden of introducing expert testimony on the reduction of future damages to present value.

Steinberg v. Jensen, 186 Wis. 2d 237, 272, 519 N.W.2d 753 (Ct. App. 1994), *rev'd on other grounds*, 194 Wis. 2d 439, 534 N.W.2d 361 (1995).

A clinical neuropsychologist may testify as to the future pain, suffering, and disability likely to be suffered by a brain-damaged person.

Glassey v. Continental Ins. Co., 176 Wis. 2d 587, 608–09, 500 N.W.2d 295 (1993).

The trial court properly exercised its discretion in preventing an expert from testifying that the use of a different screw-on cap on a pressurized spray tank would have prevented the accident at issue. Because numerous variables contributed to the accident, it would have been pure speculation for an expert to express an opinion as to whether the accident would have happened had just one variable been changed.

Castaneda v. Pederson, 176 Wis. 2d 457, 474, 500 N.W.2d 703 (Ct. App. 1993), *aff'd in part, rev'd in part*, 185 Wis. 2d 199, 518 N.W.2d 246 (1994).

An expert witness need not use any specific language in giving an opinion, as long as the expert's testimony is not speculative.

State v. Pittman, 174 Wis. 2d 255, 267, 270, 496 N.W.2d 74 (1993).

Expert testimony does not assist the fact-finder if it conveys to the jury the expert's own beliefs as to the veracity of another witness. The credibility of a witness is something a lay juror can determine without the help of an expert opinion. As a result, it was appropriate to refuse to allow a doctor to testify that it was medically impossible for a woman to sleep through intercourse because the message his testimony conveyed was that he believed that the complaining witness was lying.

State v. Williams, 168 Wis. 2d 970, 990–91, 485 N.W.2d 42 (1992).

Testimony by a former sheriff's detective that evidence from an apartment tended to indicate that the apartment's residents were involved in illegal drug sales was admissible as expert opinion testimony. The testimony was based on specialized knowledge the witness obtained as a narcotics officer and was not merely a lay opinion on whether the defendant actually intended to deliver drugs.

State v. Borrell, 167 Wis. 2d 749, 783–84, 482 N.W.2d 883 (1992).

A psychiatrist who is properly qualified as an expert on the effects of intoxication may give an opinion on the issue of a defendant's *capacity* to form the requisite intent to kill. However, an opinion that the defendant *could* have formed the intent to kill, but did not in this particular instance, is improper. Opinion testimony on this issue must indicate that the defendant's intoxication rendered the defendant incapable of forming the requisite intent to kill. As offered here, the opinion was an impermissible lay opinion on the ultimate issue of fact (whether the defendant formed that intent).

State v. Whitaker, 167 Wis. 2d 247, 255–58, 481 N.W.2d 649 (Ct. App. 1992).

Expert testimony is *required* when the issue to be decided is beyond the general knowledge and experience of the average juror. Expert testimony is *permitted*, though not required, when it will assist the trier of fact to understand the evidence.

Once a party lays a threshold foundation for a witness to give an expert opinion, the burden shifts to the adverse party to show that the underlying bases for the witness's opinion are insufficient to support that opinion.

State v. Blair, 164 Wis. 2d 64, 74, 473 N.W.2d 566 (Ct. App. 1991).

The trial court acted within its discretion in not admitting expert testimony on eyewitness identification and memory when the court found that the subject matter was within the common knowledge and sense and perception of the jury.

Milwaukee Rescue Mission, Inc. v. Redevelopment Auth., 161 Wis. 2d 472, 481, 484, 468 N.W.2d 663 (1991).

Credible evidence as to property values is not limited to testimony of witnesses who have technical expertise as appraisers. A construction firm owner was competent to testify in an eminent domain proceeding in regard to the replacement costs of buildings when he was well acquainted with the cost of such buildings, even though he was not a real estate appraiser.

I.P. v. State (In re D.S.P.), 157 Wis. 2d 106, 123–24, 458 N.W.2d 823 (Ct. App. 1990), *aff'd*, 166 Wis. 2d 464, 480 N.W.2d 234 (1992).

In an action to terminate the parental rights of the parents of an American Indian child, social workers were qualified to testify as experts on whether the parent's continued custody of the child was likely to result in serious emotional or physical damage to the child when both experts were American Indians, members of an American Indian tribe, had raised children in the tribal customs, heritage, and traditions, and had provided social work functions for their tribe.

State v. DeSantis, 155 Wis. 2d 774, 794, 456 N.W.2d 600 (1990).

Expert testimony may be admissible to describe the behavior that sexual-assault victims typically exhibit.

State v. Eichman, 155 Wis. 2d 552, 568–69, 456 N.W.2d 143 (1990).

Even when people of ordinary intelligence could understand a statute, expert testimony may still be appropriate to assist the trier of fact in understanding evidence as it relates to the meaning of terms in a statute. Thus, in a prosecution under Wis. Stat. § 940.22, for sexual exploitation by a therapist, it was appropriate to admit expert testimony in regard to whether "psychotherapy" was being practiced even though the statutory language may have been within the understanding of an ordinary person.

State v. Jensen, 147 Wis. 2d 240, 249–50, 255–57, 432 N.W.2d 913 (1988).

A witness cannot testify that another mentally and physically competent witness is telling the truth. Not even an expert can convey to the jury the expert's own belief as to the veracity of a complainant.

In this sexual-assault case, however, a school guidance counselor's expert testimony that the complaining witness's behavior was consistent with the behavior of children who have been sexually abused was admissible. The testimony was relevant to explain why the counselor's suspicions were aroused and why he questioned the complainant, and it was relevant to rebut the defense's theory that the complainant fabricated the sexual assault charge. Significantly, the expert was not asked to evaluate whether the complainant had been molested, nor did he explicitly or implicitly conclude that the complainant was a victim of sexual assault.

Expert testimony in this area is not to be allowed, however, as a matter of course, in order to avoid the risk that the jury could interpret the testimony as an opinion that a complainant is being truthful about an alleged assault. It is wise to encourage the use of expert testimony in non-opinion form when the trier can itself draw the requisite inference.

State v. Robinson, 146 Wis. 2d 315, 332–33, 335, 431 N.W.2d 165 (1988).

The question of an expert witness's qualifications is a matter resting in the sound discretion of the trial court. The qualification of an expert has historically been a matter not of licensure, but of experience. An advocate for sexual-assault victims who had worked at a rape crisis center for six years and who had dealt with 70 or 80 victims had sufficient qualifications to qualify as an expert.

Her testimony was admissible because she testified only as to her observations of the complainant and her observations of other sexual-assault victims. She was not asked to draw any inferences, and she did not offer any opinions about the complainant based on what she observed. Because the defendant had attempted to suggest to the jury that the complainant's conduct was inconsistent with her claim of having been sexually assaulted, the expert testimony relating to observations of other sexual-assault victims served a particularly useful function for the jury.

State v. Hamm, 146 Wis. 2d 130, 142, 430 N.W.2d 584 (Ct. App. 1988).

Expert testimony on eyewitness identification is not admissible per se. The court first determines whether the evidence is relevant. If it is, then the court must determine whether the witness is qualified as an expert. The allowance of scientific evidence through the testimony of an expert is within the trial court's discretion.

T.A.T. v. R.E.B. (In re Paternity of M.J.B.), 144 Wis. 2d 638, 653, 425 N.W.2d 404 (1988).

In a paternity action, the blood test report is admissible without the use of an expert witness. However, both the petitioner and the defendant have the right to call an expert witness to testify as to the assumptions on which the blood test is based and the meaning and limitations of the various tests.

State v. Pankow, 144 Wis. 2d 23, 38, 422 N.W.2d 913 (Ct. App. 1988).

Mathematical probability evidence presented by an expert may be admitted, not to prove that the defendant committed the crime, but to negate a defense theory that the deaths of three infants under babysitting care in the same household within five years were the result of sudden infant death syndrome.

Kujawski v. Arbor View Health Care Ctr., 139 Wis. 2d 455, 463, 407 N.W.2d 249 (1987).

Whether expert testimony is necessary to establish what constitutes ordinary care depends on the type of care involved. If a patient requires professional nursing or hospital care, then expert testimony as to the standard of care is necessary. However, if a patient requires nonmedical, administrative, ministerial, or routine care, the standard of care need not be established by expert testimony.

Kerkman v. Hintz, 138 Wis. 2d 131, 149, 406 N.W.2d 156 (Ct. App. 1987), *aff'd in pertinent part*, 142 Wis. 2d 404, 421, 418 N.W.2d 795 (1988).

A medical doctor's testimony as to a chiropractor's performance under the chiropractic standard of care may be relevant and therefore admissible if there is a sufficient factual showing that the medical witness is qualified by knowledge, skill, experience, training, or education to give the required opinion. However, medical doctors are not always qualified to testify in cases involving the asserted malpractice of a chiropractor. The negligence must involve a breach of duty that the medical doctor can evaluate.

State v. Friedrich, 135 Wis. 2d 1, 15–16, 398 N.W.2d 763 (1987).

Whether an expert's opinion testimony is properly received depends on whether the members of the jury, having the knowledge and general experience common to every member of the community, would be aided in consideration of the issues by the testimony offered. The credibility of witnesses and the weight given their testimony are matters left to the jury's judgment. The credibility of a witness is ordinarily something a lay juror can knowledgeably determine without the help of expert opinion.

Brain v. Mann, 129 Wis. 2d 447, 454, 385 N.W.2d 227 (Ct. App. 1986).

An expert's qualification depends on experience, not on more formal attributes, such as professional licensing. Thus, an officer who had police academy training and practical experience in accident investigations was qualified as an expert on certain matters, such as the safe speed in a construction zone. It is important, however, to distinguish among the matters on which the officer is being asked to testify, since a police officer is probably not qualified to testify on matters concerning accident reconstruction. The key to making such a determination in the absence of

specific education or licensing is whether the matter is one that a purported expert regularly considers in the ordinary course of the expert's duties and on which the expert has had some training and experience.

Maskrey v. Volkswagenwerk Aktiengesellschaft, 125 Wis. 2d 145, 165, 370 N.W.2d 815 (Ct. App. 1985).

Moving pictures of pretrial experiments are admissible if their probative value is not outweighed by prejudice, confusion, and waste of time and the jury is made aware that the pictures are offered as illustrations of principles involved. However, if the pictures are distorted, if enough of the obviously important factors are not duplicated, or the failure to control other possibly relevant variables is not explained, the pictures should be excluded.

State v. Flattum, 122 Wis. 2d 282, 288, 361 N.W.2d 705 (1985).

A psychiatrist who is properly qualified as an expert on the effects of intoxication may give an opinion in a single-phase trial as to a defendant's capacity to form an intent to kill, but only if that intent rests solely on the defendant's voluntary intoxication. *Steele v. State*, 97 Wis. 2d 72, 294 N.W.2d 2 (1980), did not overrule *Loveday v. State*, 74 Wis. 2d 503, 247 N.W.2d 116 (1976).

State v. Repp, 122 Wis. 2d 246, 254–57, 362 N.W.2d 415 (1985).

The trial court properly excluded psychiatric opinion evidence in the guilt phase of a bifurcated trial in which the proposed expert testimony would have causally linked the defendant's intoxication and mental health history with a lack of capacity to form the requisite intent to commit the charged offense.

Helmbrecht v. St. Paul Ins. Co., 122 Wis. 2d 94, 106, 362 N.W.2d 118 (1985).

The trial judge cannot be used as an expert witness in a legal malpractice action regarding matters that took place before the judge in a judicial capacity because of the unfair prejudice that it would create for the party against whom the judge was testifying.

Herman v. Milwaukee Children's Hosp., 121 Wis. 2d 531, 551–53, 361 N.W.2d 297 (Ct. App. 1984).

A qualified physician may estimate the patient's percentage of disability from which the jury can determine impairment of earning capacity.

It was error to exclude the testimony of a physician regarding a patient's vocational prospects and reduction in earning capacity when the physician practiced in the area of vocational rehabilitation.

It is not error for a court to limit cross-examination of an economist regarding the fixed cost of an annuity. Admission of annuity evidence could have misled the jury into believing it should have awarded a lesser sum than the present value of the future losses.

State v. Hinz, 121 Wis. 2d 282, 286–88, 360 N.W.2d 56 (Ct. App. 1984).

A Department of Transportation chart showing blood alcohol concentrations based on the number of drinks is relevant and admissible without the use of an expert.

State v. Johnson, 118 Wis. 2d 472, 476, 348 N.W.2d 196 (Ct. App. 1984).

It is usually assumed that experts testify only in the form of opinions. Such an assumption is logically unfounded. This rule recognizes that an expert may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Opinions are not indispensable, and the use of expert testimony in non-opinion form should be encouraged when counsel believes that the trier of fact can draw the requisite inference.

State ex rel. Eckmann v. Department of Health & Soc. Servs., 114 Wis. 2d 35, 44, 337 N.W.2d 840 (Ct. App. 1983).

A physician, chemist, medical technologist, biologist, biochemist, toxicologist, or person with similar training or experience ordinarily is qualified as an expert in conducting scientific tests to determine blood alcohol content and in interpreting the results of such tests.

D.L. v. Huebner, 110 Wis. 2d 581, 623, 329 N.W.2d 890 (1983).

For an expert to testify about a product's good safety record, it is necessary that the expert either had the opportunity to personally observe the functioning of the product or was in a position to know that if accidents had been reported, that the expert would have known about them or that the expert's testimony would be relevant to the issue.

McGarrity v. Welch Plumbing Co., 104 Wis. 2d 414, 430, 312 N.W.2d 37 (1981).

Testimony that "arthritis might be severe—but it might not be" and testimony that the expert "guessed" that there was a 20% probability that the plaintiff would have to have surgery sometime in the future was inadmissible. An expert opinion expressed in terms of possibility or conjecture cannot be admitted.

Authors' Note. While the compensability of future surgery as an element of damages depends on proof to a reasonable certainty, the plaintiff may be compensated for fear of future surgery based on a doctor's realistic prediction that future surgery is possible. *See Martindale v. Ripp*, 2001 WI 113, ¶ 79, 246 Wis. 2d 67, 629 N.W.2d 698.

Hampton v. State, 92 Wis. 2d 450, 457–59, 285 N.W.2d 868 (1979).

The decision as to whether expert opinion testimony of psychologists and psychiatrists is to be permitted for the purposes of impeaching a witness should rest within the trial court's discretion. It is proper for a trial court to allow an expert to testify regarding the general inability of people to make eyewitness identifications, in addition to testifying to specific mental or physical problems that tend to impair mental faculties.

The trial court has great discretion in limiting such testimony. It is permissible for the trial court to allow the expert only to inform the jury of the psychological principles underlying human observation and perception, but to preclude the expert from applying those principles to the reliability of the specific witness whose identification is being attacked.

Drexler v. All Am. Life & Cas. Co., 72 Wis. 2d 420, 431–33, 241 N.W.2d 401 (1976).

A medical expert may express an opinion as to whether the pain of one the expert has attended or examined is real, imaginary, or feigned.

Testimony such as "I felt," "I feel," "I believe," "liable," "likely," and "probably" are all sufficient to satisfy the "certainty" requirements for expert opinion.

Capitol Sand & Gravel Co. v. Waffenschmidt, 71 Wis. 2d 227, 234, 237 N.W.2d 745 (1976).

Measurement testimony based on memory or casual observation must yield to that which is based on actual measurement. The actual measurement testimony is not to be rejected in the absence of opposing proof.

See also ....

State v. Schmidt, 2016 WI App 45, ¶¶ 76–84, 370 Wis. 2d 139, 884 N.W.2d 510 (expert testimony, even if otherwise admissible under Wis. Stat. § 907.02(1), should be excluded if it does not meet basic relevance requirements for a particular case)

State v. Bednarz, 179 Wis. 2d 460, 466–68, 507 N.W.2d 168 (Ct. App. 1993) (expert can testify that recantation is suggestive of posttraumatic stress in battered women)

State v. Anderson, 176 Wis. 2d 196, 200, 500 N.W.2d 328 (Ct. App. 1993) (expert testimony not always necessary to prove substance is controlled)

State v. Smith, 170 Wis. 2d 701, 717–19, 490 N.W.2d 40 (Ct. App. 1992) (detective could testify that witness denied involvement in fire, then later changed story to reflect what detective perceived was truth; this was not opinion on witness's truthfulness)

York v. National Cont'l Ins. Co., 158 Wis. 2d 486, 494, 463 N.W.2d 364 (Ct. App. 1990) (engineer could offer explanation of physical facts and conclusions from them, even if no eyewitnesses to accident)

Secura Ins. Co. v. Wisconsin Pub. Serv. Corp., 156 Wis. 2d 730, 735, 457 N.W.2d 549 (Ct. App. 1990) (no conflict of interest by expert when one party only inquires about expert's qualifications and availability and other party retains same expert)

Farrell v. John Deere Co., 151 Wis. 2d 45, 71, 443 N.W.2d 50 (Ct. App. 1989) (engineer was properly qualified to testify that emergency shut-off device would have reduced severity of injuries)

State v. Haseltine, 120 Wis. 2d 92, 95–96, 352 N.W.2d 673 (Ct. App. 1984) (opinion that girl was incest victim with "no doubt whatsoever" was inadmissible)

Maci v. State Farm Fire & Cas. Co., 105 Wis. 2d 710, 720, 314 N.W.2d 914 (Ct. App. 1981) (expert testimony, if court finds would assist jury in understanding evidence or determining fact in issue, will usually be admissible unless superfluous and waste of time)

Hagenkord v. State, 100 Wis. 2d 452, 463, 302 N.W.2d 421 (1981) (Wis. Stat. § 907.02 allowed medical student, as "medical lexicographer" to testify concerning complicated medical terms contained in a hospital chart)

Karl v. Employers Ins., 78 Wis. 2d 284, 297, 254 N.W.2d 255 (1977) (expert's qualifications historically rest on experience, not licensure; if qualified as expert, psychologist may testify as to mental condition)

Grassl v. Nelson, 75 Wis. 2d 107, 112–13, 248 N.W.2d 403 (1977) (medical expert may express opinion based on medical probabilities (not mere possibilities) as to whether pain will continue and, if so, for how long; expert's prior inconsistent statements about medical possibility are material to credibility)

Green v. Rosenow, 63 Wis. 2d 463, 470, 217 N.W.2d 388 (1974) (if satisfactory proof of qualifying experience, licensed chiropractor may testify and give opinions about matters within chiropractic field)

907.03 Bases of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect.

Judicial Council Committee's Note (1974)

In *Rabata v. Dohner*, 45 Wis. 2d 111, 172 N.W.2d 409 (1969), Rule 409 of the Model Code was adopted, which is in accord with the first sentence of this section. The second sentence broadens the rule of permissible data. Wisconsin has approved such practice with respect to medical experts in *Vinicky v. Midland Mut. Casualty Ins. Co.*, 35 Wis. 2d 246, 151 N.W.2d 77 (1967), and *Roberts v. State*, 41 Wis. 2d 537, 164 N.W.2d 525 (1969); and therein commented favorably upon McCormick's view, which supports this portion of the rule. However, earlier Wisconsin cases both support, *Kaczmarek v. Geuder, P. & F. Co.*, 148 Wis. 46, 134 N.W. 348, 44 L.R.A. N.S., 779, Ann. Cas. 1913A 1139 (1912) and reject, *Schumacher v. Carl G. Neumann D. & I. Co.*, 206 Wis. 220, 239 N.W. 459 (1931) hearsay as a basis for expert opinion. Note that the reliance by an expert upon inadmissible data in a report does not "open the door" to other inadmissible evidence in the same report, *Gibson v. State*, 55 Wis. 2d 110, 197 N.W.2d 813 (1972). See the cases cited in the Judicial Council Committee's Note to s. 907.05.

Authors' Note. In 2011 Wis. Act 2 § 38, the Wisconsin Legislature amended Wis. Stat. § 907.03 to conform to Fed. R. Evid. 703 by excluding on direct examination inadmissible evidence relied on by an expert witness in forming an opinion. This is not a hearsay exception but a rule of limited admissibility. However, the otherwise-inadmissible evidence may be inquired into on cross-examination.

The 2011 amendment also added the last sentence, consistent with the federal rule. This requires the trial court to determine that the probative value of otherwise inadmissible facts or data in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect.

In criminal cases, an expert's reliance on out-of-court statements raises issues under the Sixth Amendment's Confrontation Clause. That analysis was fundamentally reshaped in *Crawford v. Washington*, 541 U.S. 36 (2004). In *Smith v. Arizona*, 144 S. Ct. 1785 (2024), the U.S. Supreme Court held that when a testifying expert relies on an absent lab analyst's statements that support the expert's testimony only if true, then the statements are hearsay for purposes of the *Crawford* analysis. Therefore, caution must be exercised in applying cases decided before *Crawford*.

Case Annotations

State v. Thomas, 2023 WI 9, ¶¶ 57–70, 405 Wis. 2d 654, 985 N.W.2d 87 (Dallet, J., concurring).

Under Wis. Stat. § 907.03, experts may rely on inadmissible evidence, including hearsay, in forming their opinions. If such inadmissible evidence is used only for impeachment of an expert's credibility on cross-examination, its use cannot not constitute a violation of the Confrontation Clause under *Crawford v. Washington*, because the Confrontation Clause applies only to testimonial hearsay, which is by definition an out-of-court statement offered for its truth. However, the record here showed the state used the laboratory report in question to show the truth of matters contained in the report—that the defendant and the victim each had the other's DNA under their fingernails. Because the defendant had no opportunity to confront the analyst, there was a violation of *Crawford*. However, the court held the error was harmless.

State v. Heine, 2014 WI App 32, ¶ 15, 354 Wis. 2d 1, 844 N.W.2d 409.

A physician who performed an autopsy relied, in part, on a laboratory's toxicology report to conclude that the victim died of a heroin overdose. The court discussed the rationale behind Wis. Stat. § 907.03 and held that, while the trial court did not make the required finding that the probative value substantially outweighed the prejudicial effect of the report, any error in receiving the report was harmless. Under the circumstances, the physician was "no mere conduit" for the report, and he could have given his opinion without referring to the report.

Authors' Note. This case contains a helpful explanation of the purpose of Wis. Stat. § 907.03, but it should not be relied on in support of the admissibility of a toxicology report made by someone other than the witness without considering more recent cases decided under *Crawford*, particularly *State v. Mattox*, 2017 WI 9, 373 Wis. 2d 122, 890 N.W.2d 256, and cases that *Mattox* cites.

State v. Kleser, 2010 WI 88, ¶ 91, 328 Wis. 2d 42, 786 N.W.2d 144.

While an expert can rely on inadmissible evidence in formulating an opinion (when it is a type of evidence reasonably relied on by experts in a particular field), an expert cannot be used as a conduit for inadmissible evidence. Thus, in this reverse-waiver case, the circuit court erroneously

permitted a psychologist to testify about the juvenile's description to her of the events relating to the charged offense when the juvenile did not testify. That underlying testimony was inadmissible hearsay and was not rendered admissible by Wis. Stat. § 907.03.

State v. Fischer, 2010 WI 6, ¶¶ 16–25, 322 Wis. 2d 265, 778 N.W.2d 629.

An expert opinion as to the level of intoxication in a drunk-driving case, which relies on a preliminary field breath test, is not admissible under Wis. Stat. § 907.03 because such admissibility would undermine the absolute legislative prohibition of the admissibility of preliminary field breath tests in court as enacted in Wis. Stat. § 343.303.

Note. Wis. Stat. § 343.303 allows the admission of preliminary breath screening test results "to show probable cause for an arrest, if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305(3)."

Caution. The U.S. District Court for the Eastern District of Wisconsin later vacated the conviction of the defendant in *Fischer* by granting his writ of habeas corpus, determining that the supreme court's decision was an unreasonable application of federal law on the right to present a defense. *See Fischer v. Ozaukee Cnty. Cir. Ct*, 741 F. Supp. 2d 944 (E.D. Wis. 2010).

Staskal v. Symons Corp., 2005 WI App 216, ¶¶ 22–23, 287 Wis. 2d 511, 706 N.W.2d 311.

Wis. Stat. § 907.03 is not a hearsay exception. It does not make inadmissible hearsay admissible. It makes an expert's opinion admissible even if the expert has relied on inadmissible hearsay in arriving at the opinion, as long as the hearsay is the type of facts or data reasonably relied on by experts in the particular field in forming opinions on the subject.

To guard against "back door" introduction of inadmissible hearsay on cross-examination, trial courts are given latitude to determine when to permit the underlying hearsay to reach the trier of fact through examination of the expert—with an accompanying curative instruction—or when to exclude the evidence altogether.

Walworth Cnty. v. Therese B. (In re Guardianship of Therese B.), 2003 WI App 223, ¶¶ 18–20, 267 Wis. 2d 310, 671 N.W.2d 377.

A medical expert's report and testimony are admissible, despite reliance on the opinions of other medical professions, if facts relied on by the other medical professionals in forming their opinions are independently confirmed by the medical expert relying on those opinions.

State v. Williams, 2002 WI 58, ¶¶ 20, 28–31, 253 Wis. 2d 99, 644 N.W.2d 919.

The defendant's right to confrontation was not violated by the testimony of a "highly qualified" expert in the form of an independent expert opinion as to the nature of a substance tested by another person, when both the expert and tester were employed by the same analytical lab and the tester's work was subject to peer review by the expert.

Authors' Note. This case was pre-*Crawford* and must be read in light of *Crawford* and other cases applying *Crawford* to an expert witness's testimony based on lab tests the expert did not perform. *See, e.g.*, *Smith v. Arizona*, 144 S. Ct. 1785 (2024); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *State v. Mattox*, 2017 WI 9, 373 Wis. 2d 122, 890 N.W.2d 256; *State v. Griep*, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567; *State v. Deadwiller*, 2013 WI 75, 350 Wis. 2d 138, 834 N.W.2d 362.

State v. Pletz (In re Commitment of Pletz), 2000 WI App 221, ¶¶ 27–29, 239 Wis. 2d 49, 619 N.W.2d 97.

In a proceeding to determine whether an individual was a "sexually violent person" pursuant to Wis. Stat. ch. 980, it was not appropriate to permit the state's expert to rely on isolated opinions made by members of the committee for the diagnostics and statistical manual (DSM). Those opinions were isolated responses to hypothetical questions and did not reflect the consensus of the profession, while the official DSM criteria pronouncements do.

State v. Pharm, 2000 WI App 167, ¶¶ 28–32, 238 Wis. 2d 97, 617 N.W.2d 163.

In a proceeding to determine if an individual was a sexually violent person under Wis. Stat. ch. 980, an expert called by the state, to offer an opinion regarding whether the respondent met the statutory definition of a sexually violent person, could testify as part of the basis for that opinion that he did not believe the respondent's version of the relevant events. This testimony did not constitute an improper comment on the respondent's truthfulness, because it was received in order to explain the facts and data that the expert relied on in forming his opinion, and the jury was instructed that it was the sole judge of a witness's credibility.

State v. Watson, 227 Wis. 2d 167, 191–98, 595 N.W.2d 403 (1999).

Experts in the field of corrections routinely and reasonably rely on presentence investigations to form opinions. Therefore, in a probable cause hearing on a petition to commit a person under the sexual predator statute, the opinion of a clinical psychologist, who relied in whole or in part on inadmissible hearsay evidence from a presentence investigation, was itself admissible. However, Wis. Stat. § 907.03 is not a hearsay exception.

Kolpin v. Pioneer Power & Light Co. 162 Wis. 2d 1, 36–37, 469 N.W.2d 595 (1991).

Since an expert may base an opinion on facts perceived by others, if reasonably relied on by experts in the field, the assertion that an opinion is not based on first-hand knowledge has no effect on admissibility. It goes only to weight. The expert may rely on hearsay, and that hearsay may

be admissible for the limited purpose of serving as a basis for the opinion. But this section does not create a hearsay exception.

Authors' Note. *Kolpin* specifically repudiated language in *Bagnowski v. Preway, Inc.*, 138 Wis. 2d 241, 251, 405 N.W.2d 746 (Ct. App. 1987), that suggested Wis. Stat. § 907.03 created a hearsay exception. *Kolpin*, 162 Wis. 2d at 37 n.10.

State v. Coogan, 154 Wis. 2d 387, 399–400, 453 N.W.2d 186 (Ct. App. 1990).

An expert's psychiatric diagnosis is admissible, despite the expert's partial reliance on evidence that is legally inadmissible. But the underlying factual basis for the diagnosis, to the extent that it is independently inadmissible, is not admissible unless the state opens the door by cross-examining the expert on the unreliability of the facts underlying the expert's opinion.

Gaertner v. 880 Corp., 131 Wis. 2d 492, 505–06, 389 N.W.2d 59 (Ct. App. 1986).

Expert opinion based on information either provided by one of the plaintiff's attorneys or contained in the complaint is insufficient as a matter of law to serve as a basis for an award of damages.

Brain v. Mann, 129 Wis. 2d 447, 460–61, 385 N.W.2d 227 (Ct. App. 1986).

An expert's opinion is not inadmissible merely because it is based on statistical surveys that in themselves would have been inadmissible because they were not shown to have been conducted in accordance with generally accepted survey principles.

If an expert testifies that material on which the expert is relying is of the type that is reasonably relied on by other experts in the field, the expert's opinion is admissible. An expert is competent to judge the reliability of statements made to the expert by other investigators or technicians. If the expert attests to them as a basis for a judgment on which the expert would act in the practice of the expert's profession, those statements are then a sufficient basis for the expert's opinion.

This ruling specifically addresses itself to the admissibility of the expert's testimony and does not allow the admission of the surveys themselves.

Gonzalez v. City of Franklin, 128 Wis. 2d 485, 499–500, 383 N.W.2d 907 (Ct. App. 1986), *aff'd*, 137 Wis. 2d 109, 403 N.W.2d 747 (1987).

Experts may be cross-examined regarding whether or not they were provided with all the "traditional documentation" relating to their field. If they were not, then further questions may be asked regarding what data were provided as a basis for their conclusions.

Liles v. Employers Mut. Ins., 126 Wis. 2d 492, 506, 377 N.W.2d 214 (Ct. App. 1985).

An employment expert may be cross-examined on the basis of a letter containing employment information written by another, which would otherwise be inadmissible, if of a type customarily relied on by the expert.

Authors' Note. Although experts may base their opinions on hearsay if of a type customarily relied on in that field in forming opinions (and experts may testify in detail giving the hearsay), the *Liles* opinion seems to state that hearsay that could have been relied on by an expert in forming an opinion but that was not even known to the expert may be introduced on cross-examination and the expert required to give an opinion based on those facts. The authors believe this is an erroneous reading of this section. The authors agree an expert may be cross-examined as to how the consideration of new factors might cause a change in the expert's opinion, but the jury should be instructed that they are hypothetical only until competent proof of their existence is introduced.

Rennick v. Fruehauf Corp., 82 Wis. 2d 793, 807–08, 264 N.W.2d 264 (1978).

A medical expert may testify concerning a diagnosis or medical opinions contained in a report of a consulting specialist that the expert used in making the expert's own diagnosis.

907.04 Opinion on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Judicial Council Committee's Note (1974)

This section is consistent with *Rabata v. Dohner*, 45 Wis. 2d 111, 172 N.W.2d 409 (1969).

Case Annotations

State v. LaCount, 2008 WI 59, ¶ 21, 310 Wis. 2d 85, 750 N.W.2d 780.

"Expert opinion testimony on an ultimate fact is permissible, even where the evidentiary facts on which the ultimate fact in issue depends are in dispute, so long as the opinion on the ultimate fact is given using a hypothetical case or situation."

State v. Burgess (In re Commitment of Burgess), 2002 WI App 264, ¶ 27, 258 Wis. 2d 548, 654 N.W.2d 81, *aff'd*, 2003 WI 71, 262 Wis. 2d 354, 665 N.W.2d 124.

In a commitment proceeding to determine whether an individual was a sexually violent person, the state's expert could offer an opinion on the ultimate issue that the respondent would reoffend because of his mental disorder.

State v. Elm, 201 Wis. 2d 452, 458–61, 549 N.W.2d 471 (Ct. App. 1996).

A physician may provide expert medical opinion concluding that the ultimate cause of physical injuries sustained by an alleged victim was molestation. Such an opinion does not convey the physician's personal opinion as to whether the victim is truthful. Furthermore, such testimony does not purport to identify the particular defendant as the individual who may have molested the victim.

Mercurdo v. County of Milwaukee, 82 Wis. 2d 781, 790 n.4, 264 N.W.2d 258 (1978).

The opinion rule does not preclude opinions phrased in conclusion terms such as "fault," since evidence is not rendered inadmissible because it embraces the ultimate issue to be decided by the trier of fact.

907.05 Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give the reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Judicial Council Committee's Note (1974)

This section is consistent with *Rabata v. Dohner*, 45 Wis. 2d 111, 172 N.W.2d 409 (1969). Within limits, the basis of opinion and the underlying facts and data are obtainable by discovery. *Halldin v. Peterson*, 39 Wis. 2d 668, 159 N.W.2d 738 (1968); *State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis. 2d 559, 150 N.W.2d 387 (1967); *State ex rel. Reynolds v. Circuit Court for Waukesha County*, 15 Wis. 2d 311, 112 N.W.2d 686, *rehearing denied* 15 Wis. 2d 311, 113 N.W.2d 537 (1961).

Authors' Note. See the annotation for *State v. Thomas*, 2023 WI 9, 405 Wis. 2d 654, 985 N.W.2d 87, under Wis. Stat. § 907.03. If an expert relies on inadmissible evidence, that evidence can be used to impeach the expert, but it cannot be offered for the truth of matters asserted.

907.06 Court appointed experts.

(1) Appointment. The judge may on the judge's own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The judge may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of the judge's own selection. An expert witness shall not be appointed by the judge unless the expert witness consents to act. A witness so appointed shall be informed of the witness's duties by the judge in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness's findings, if any; the witness's deposition may be taken by any party; and the witness may be called to testify by the judge or any party. The witness shall be subject to cross-examination by each party, including a party calling the expert witness as a witness.

(2) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the judge may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and cases involving just compensation under ch. 32. In civil cases the compensation shall be paid by the parties in such proportion and at such time as the judge directs, and thereafter charged in like manner as other costs but without the limitation upon expert witness fees prescribed by s. 814.04(2).

(3) Disclosure of appointment. In the exercise of discretion, the judge may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(4) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(5) Appointment in criminal cases. This section shall not apply to the appointment of experts as provided by s. 971.16.

Judicial Council Committee's Note (1974)

Sub. (1). A proposed rule for impartial medical experts was considered by the Supreme Court in January, 1965. It was not promulgated. At the present time a parallel to s. 907.06 is found in s. 971.16, providing for court appointment of experts in criminal cases where insanity is in issue or questioned. The constitutionality of that section has been approved in *State v. Bergenthal*, 47 Wis. 2d 668, 178 N.W.2d 16 (1970), *certiorari denied* 402 U.S. 972, 91 S. Ct. 1657, 29 L. Ed. 2d 136; *State ex rel. LaFollette v. Raskin*, 34 Wis. 2d 607, 150 N.W.2d 318 (1967), and *Jessner v. State*, 202 Wis. 184, 231 N.W. 634, 71 A.L.R. 1005 (1930), in which the principle of "independent" experts was given strong support. Wigmore finds the inherent power of the court to appoint experts (Wigmore, s. 563) lodged in the authority to call witnesses (Wigmore, s. 2484, *et seq.*). *See* s. 906.14; Rule 105(d) Model Code; Uniform rule 59, and commentary and McCormick at 14. Wisconsin has approved the authority of judges to call witnesses in *State v. Nutley*, 24 Wis. 2d 527, 129 N.W.2d 155 (1964), *certiorari denied* 380 U.S. 918, 85 S. Ct. 912, 13 L. Ed. 2d 803, and *Welter v. Wisconsin*, 380 U.S. 422, 85 S. Ct. 921, 13 L. Ed. 2d 806. The resources of the State Crime Lab are available to a defendant in a felony action upon a judge's approval, s. 165.79(1) and (2), and the court may order a blood test in a paternity action, s. 52.36. The court's power to effectuate the appointment with appropriate orders and directions [e.g., s. 269.57(2) and *Alexander v. Farmers Mut. Auto Ins. Co.*, 25 Wis. 2d 623, 131 N.W.2d 373 (1964)] is correlative to the inherent power to appoint experts. Routine utilization of the power to appoint experts is an abuse of judicial discretion. Unless a substantial difference of opinion by experts of adverse parties exists, other than a difference of opinion resulting from accepted but differing schools of professional thought, the power of the court to appoint experts should not be used. In exercising that power the court should give the parties a reasonable voice in the selection of the expert to the end that they may be reasonably assured of his impartiality (e.g., s. 269.57(2) Stats., as amended). An interpreter is an expert. *See* s. 906.04.

Sub. (2). The alteration to the Federal Rule merely conforms to the reference to eminent domain cases to Wisconsin statutes. It also removes the $25 expert witness fee limitation upon statutory taxable costs when the court appoints an expert witness.

Sub. (5). This addition to the Federal Rule makes clear the distinction between the application of this subsection and s. 971.16.

Case Annotations

Carney-Hayes v. Northwest Wis. Home Care, Inc., 2005 WI 118, ¶¶ 5, 61, 284 Wis. 2d 56, 699 N.W.2d 524.

Subject to the compelling need exception recognized in *Burnett v. Alt* and *Glenn v. Plante*, a medical witness who is unwilling to testify as an expert cannot be forced to give the expert's opinion of the standard of care applicable to another person or an opinion of the treatment provided by another person. Unless the unwilling witness is alleged to have caused injury to the plaintiff by the witness's own medical negligence, the witness need not give an opinion on the standard of care of the witness's own conduct.

The court should assure that any medical witness from whom expert opinion is required is qualified to testify as an expert witness under Wis. Stat. § 907.02.

Glenn v. Plante, 2004 WI 24, ¶¶ 21, 26, 33–34, 269 Wis. 2d 575, 676 N.W.2d 413.

The patient's treating physician should not have been required to give expert opinion testimony because the record did not clearly reflect the questions to be asked of the physician, nor was he given the opportunity to invoke the privilege not to testify.

A person who has asserted the privilege not to testify as an expert can be required to give expert testimony only if (1) there are compelling circumstances; (2) the party seeking the testimony has a plan for reasonable compensation of the expert; and (3) the expert will not be required to do additional preparation for the testimony. The compelling circumstances determination should focus on whether there is unique or irreplaceable opinion testimony sought from the expert.

F.R. v. T.B. (In re Visitation of Z.E.R.), 225 Wis. 2d 628, 653–56, 593 N.W.2d 840 (Ct. App. 1999).

The trial court committed only harmless error by not issuing an order after appointing an expert to evaluate and interview a child's father and grandmother in connection with proceedings to determine visitation rights to the child. The record evidenced the court's intention to have an expert conduct a psychological evaluation and assist the court in determining issues in controversy. Accordingly, the court appropriately ordered that the father and grandmother share the cost of the expert's fees pursuant to Wis. Stat. § 907.06(2).

Burnett v. Alt, 224 Wis. 2d 72, 86, 589 N.W.2d 21 (1999).

A witness's privilege to refuse to provide expert testimony is inherent in Wis. Stat. § 907.06.

907.07 Reading of report by expert.

An expert witness may at the trial read in evidence any report which the witness made or joined in making except matter therein which would not be admissible if offered as oral testimony by the witness. Before its use, a copy of the report shall be provided to

the opponent.

Judicial Council Committee's Note (1974)

This section adopts Model Code Rule 408. It accords with the widespread practice favored by proponent and opponent of the expert's testimony. It conserves time and affords better opportunity to the opponent to make timely objection. There is no comparable rule in the proposed federal rules of evidence.

Chapter 25
Definitions and Rules

908.01 Definitions.
The following definitions apply under this chapter:

(1) STATEMENT. A "statement" is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by the person as an assertion.

(2) DECLARANT. A "declarant" is a person who makes a statement.

(3) HEARSAY. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(4) STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if:

(a) *Prior statement by witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

1. Inconsistent with the declarant's testimony, or

2. Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or

3. One of identification of a person made soon after perceiving the person; or

(b) *Admission by party opponent*. The statement is offered against a party and is:

1. The party's own statement, in either the party's individual or a representative capacity, or

2. A statement of which the party has manifested the party's adoption or belief in its truth, or

3. A statement by a person authorized by the party to make a statement concerning the subject, or

4. A statement by the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship, or

5. A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Judicial Council Committee's Note (1974)

California v. Green, 399 U.S. 149, 90 S. Ct. 1930, 26 L.Ed.2d 489 (1970), seems to substantiate the position taken by the Federal committee. See *The Confrontation Test for Hearsay Exceptions: An Uncertain Standard, California v. Green*, 59 Cal. L. Rev. 580 (1971). The confrontation

clause of the Wisconsin Constitution appears to have been interpreted by the Wisconsin Supreme Court consistently with the United States Supreme Court's interpretation of the 6th Amendment confrontation clause. *Gaertner v. State*, 35 Wis. 2d 159, 150 N.W.2d 370 (1967); *State v. Lafernier*, 44 Wis. 2d 440, 171 N.W.2d 408 (1969); 1 West's, Wisconsin Statutes Annotated, art. I, s. 7, n. 9–13.

Sub. (1). In Wisconsin hearsay evidence may be an oral or written assertion. *Auseth v. Farmers Mut. Auto Ins. Co.*, 8 Wis. 2d 627, 630, 99 N.W.2d 700, 702 (1959); *Lehan v. Chicago & N.W. Ry.*, 169 Wis. 327, 172 N.W. 787 (1919). Nonverbal conduct intended as an assertion has not been defined as hearsay in Wisconsin cases. In *Johnson v. State*, 254 Wis. 320, 36 N.W.2d 86 (1949), the act of pointing to a suspect in a lineup was held not hearsay. The following comment about the holding has been made:

> The decision is doubtful. By pointing out the defendant, the boy was communicating to the police officer just as he would have been had he said, 'The third man on the left is the person who molested me.'—Swietlik, *Hearsay Rule in Wisconsin—Part One*, 1961 Wis. Cont. Leg. Ed. 2, (April, No. 2).

Note is made at this time of the complexity of the difference between circumstantial evidence of conduct from which inferences may be drawn by the trier of the fact and conduct which is intended as an assertion. The former is admissible circumstantial evidence, the latter is inadmissible hearsay, and the distinction is sometimes exceedingly narrow. The subject is discussed in the comments to sub. (3) and to s. 908.03(3).

Attention is called to the definition which places the burden upon the objector to establish the intended assertion of nonverbal conduct if he is to prevail upon his objection.

The nonverbal conduct will be the basis of ascertaining the intention but if the evidence to ascertain intention is to be more extensive, the burden is upon the objector to adduce it. The decision thereon is made by the judge as a finding of preliminary fact pursuant to s. 901.04.

It is the intention of the "declarant" [as defined in subsection (2)]—not the intention of the proponent in offering the evidence—that controls the question of whether the "statement" (as defined in this subsection) is intended as an assertion. The intention of the declarant as a means of distinction between circumstantial evidence and hearsay should not be confused with the purpose of the proponent to prove the truth of the matter asserted referred to in sub. (3), which also is determinative of admissibility.

Sub. (3). When the purpose of the proponent in offering the statement is to prove the truth of the matter asserted, a "statement" other than the one made by the declarant while testifying at trial is hearsay. *Gilbert v. United States Fire Ins. Co.*, 49 Wis. 2d 193, 208, 181 N.W.2d 527, 535 (1970); *Woodhull v. State*, 43 Wis. 2d 202, 214, 168 N.W.2d 281, 287 (1969); *Grunwald v. Halron*, 33 Wis. 2d 433, 439, 147 N.W.2d 543, 547 (1966); *Auseth v. Farmers Mut. Auto. Ins. Co.*, 8 Wis. 2d 627, 99 N.W.2d 700 (1959). In the case of an oral or written statement that lends itself to the differing views with respect to the nature of the assertion, or nonverbal conduct, the intention of the declarant is the key to whether the statement can become hearsay. However, it is not hearsay unless the proponent offers it for the purpose of (with the intention of) proving the truth of the matter asserted. *Wilder v. Classified Risk Ins. Co.*, 47 Wis. 2d 109, 286, 291, 177 N.W.2d 109, 113 (1970); *Estate of Staniszewski*, 28 Wis. 2d 403, 408, 137 N.W.2d 57, 60 (1965); *Outagamie County v. Town of Brooklyn*, 18 Wis. 2d 303, 309, 118 N.W.2d 201, 204 (1962).

Sub. (4)(a). Prior Statement by Witness. The exclusion from the definition of hearsay of an out-of-court statement by a witness who has testified at the trial or hearing and is subject to cross-examination concerning the statement seems only a modification of Wisconsin law as described in the three situations enumerated below. In *Gilbert v. United States Fire Ins. Co.*, 49 Wis. 2d 193, 209, 181 N.W.2d 527, 536 (1970), an out-of-court statement by a witness was denominated "hearsay" but non-prejudicial, although in *Gelhaar v. State*, 41 Wis. 2d 230, 163 N.W.2d 609 (1969), *certiorari denied* 399 U.S. 929, 90 S. Ct. 2250, 26 L. Ed.2d 697, the court had quoted with approval from the Model Code, Rule 503:

> Evidence of a hearsay declaration is admissible if the judge finds that the declarant … is present and subject to cross-examination.

(1) Prior inconsistent statements by a witness who is a party or agent have always been "admissions" and substantive evidence. Impeaching evidence was not substantive in Wisconsin until *Gelhaar v. State, supra*, when the following rule was adopted:

> A statement made on a former occasion by a declarant having an opportunity to observe the facts stated, will be received as evidence of such facts, notwithstanding the rule against hearsay if
>
> (1) the statement is proved to have been written or signed by the declarant, or to have been given by him as testimony in a judicial or official hearing, or the making of the statement is acknowledged by the declarant in his testimony in the present proceeding, and
>
> (2) the party against whom the statement is offered is afforded an opportunity to cross-examine the declarant …
>
> and (3) the witness has testified to the same events in a contrary manner in the present proceedings.

The rule here proposed would modify *Gelhaar* by eliminating the first limitation upon its rule, that is, the statement may be oral. In addition, *Gelhaar* was limited to the impeachment of an opposing party's witness and that limitation would be eliminated by this rule and s. 906.07. The *Gelhaar* case did not modify the interpretation of s. 885.35, made in *State v. Major*, 274 Wis. 110, 79 N.W.2d 75 (1956), that the introduction of a hostile witness's statement as substantive evidence in a criminal case is not permitted; although *Gelhaar* expressed the view that the extension of the rule to a hostile witness situation was "logical." The foregoing statute was renumbered s. 972.09 and broadened in the Criminal Procedure Act to withdraw the rule of *State v. Major*. As broadened, the section retains the first limitation of *Gelhaar*. It is withdrawn by deletion from s. 972.09.

(2) Prior consistent statements offered to rebut an express or implied charge of recent fabrication or improper influence or motive have been admissible in Wisconsin, at least where the charge is express. *Ruplinger v. Theiler*, 6 Wis. 2d 493, 95 N.W.2d 254 (1959); *Johnson v. Smitz*, 274 Wis. 96, 99, 79 N.W.2d 337, 339 (1956); *J.F. Rappel Co. v. Manitowoc*, 182 Wis. 141, 195 N.W. 399 (1923); *Pocquette v. Carpiaux*, 261 Wis. 340, 52 N.W.2d 787 (1952). However, the rule would modify Wisconsin law by making the evidence substantive. Although there are no Wisconsin cases that address themselves to an implied charge of recent fabrication or improper influence or motive the admissibility of prior consistent statements after an inference of such a charge is consistent with the common law. Wigmore, ss. 1126 to 1132.

This is an appropriate point to note that nowhere in these sections is a reference made to the term "self-serving." That term is associated with hearsay, *Thompson v. Dairyland Mut. Ins. Co.*, 30 Wis. 2d 187, 190, 140 N.W.2d 200, 202 (1966); *Adams v. Quality Service Laundry & Dry Cleaners*, 253 Wis. 334, 34 N.W.2d 148 (1948); *Hall v. Walton*, 253 Wis. 138, 33 N.W.2d 316 (1948); *Kowalsky v. Whipkey*, 240 Wis. 59, 2 N.W.2d 704 (1942), but more precisely refers to a prior consistent statement of a witness. That general category has been modified by this subsection which withdraws from hearsay "a prior consistent statement to rebut an express or implied charge against him of recent fabrication or improper influence or motive."

(3) It is said in *State v. Clark*, 36 Wis. 2d 263, 276, 153 N.W.2d 61, 68 (1967), *certiorari denied* 393 U.S. 861, 89 S. Ct. 140, 21 L. Ed.2d 129:

> There are no Wisconsin cases on the point of police lineup practices, but there are cases in other jurisdictions which hold that identifications made at police lineups are admissible into evidence. (Citing cases and Annot., 71 A.L.R.2d 449.)

See Willis v. State, 208 So.2d 458 (Fla. 1968). However, in *O'Toole v. State*, 105 Wis. 18, 20–21, 80 N.W. 915, 916 (1899), a pretrial identification by a victim offered through the testimony of an officer to whom it was made, was found to be inadmissible hearsay and the conviction was reversed. The rule in Wisconsin therefore seems to be changed by this subsection.

Note that prior consistent statements of a witness which are hearsay may be admitted under exceptions such as records of regularly conducted activity, excited utterances, and statements of the declarant's then existing state of mind, emotion, sensation or physical condition.

In *Gillotti v. State*, 135 Wis. 634, 116 N.W. 252 (1908), the court rejected as hearsay the testimony of a sheriff corroborating prior identification testimony of a complaining witness but there was no objection raised upon appeal or by the court to the prior identification testimony of the complaining witness. It seems tenable to infer from the quotation in *Clark* that the rule is not a major change in Wisconsin law, although the question of whether the prior identification testimony is substantive has not been specifically determined. Current cases seem primarily concerned with the constitutional considerations of illegal lineups or suggestive pretrial photographic identification. *State v. McGee*, 52 Wis. 2d 736, 190 N.W.2d 893 (1971); *State v. Brown*, 50 Wis. 2d 565, 185 N.W.2d 323 (1971).

(b) Admissions. Exclusion of evidential admissions from the category of hearsay is a technical change in Wisconsin law. Wisconsin had considered admissions as a hearsay exception. *Smith v. Rural Mut. Ins. Co.*, 20 Wis. 2d 592, 601, 123 N.W.2d 496, 502 (1963); *Marek v. Knab Co.*, 10 Wis. 2d 390, 397, 103 N.W.2d 31, 35 (1960); *Steffes v. Farmers Mut. Auto. Ins. Co.*, 7 Wis. 2d 321, 333, 96 N.W.2d 501, 508 (1959). Exclusion of evidential admissions from the category of hearsay has no substantive effect, places the receipt of admissions upon the more rational basis of the nature of the adversary system and results in no alteration of the effect of prior Wisconsin decisions. The reasons for the hearsay rule are not applicable. There is no need for a party to cross-examine himself nor should he be heard to require that his own statements be under oath. It also simplifies the analysis of hearsay because most admissions are out-of-court statements and since some admissions are by conduct or silence, it places them with other circumstantial evidence outside the hearsay category.

Use of the phrase, "admission against interest" in the cited cases merits this observation by McCormick s. 240:

> A type of evidence with which admissions may be confused is evidence of Declarations against Interest. Such declarations, coming in under a separate exception to the hearsay rule, to be admissible must have been against the declarant's interest when made. No such requirement applies to admissions.… Of course, most admissions are actually against interest when made, but there is no such requirement. Hence the common phrase in judicial opinions, "admissions against interest" is an invitation to confuse two separate exceptions to the hearsay rule. Other apparent distinctions are that admissions must be statements of a party to a lawsuit (or his predecessor or representative) and must be offered, not for, but against him, whereas the Declaration against Interest need not be and usually is not made by a party or his predecessor or representative, but by some third person. Finally the Declaration against Interest

exception admits the declaration only when the declarant by death or otherwise, has become unavailable as a witness, whereas obviously no such requirement is applied to admissions of a party.

This comment about the generic nature of admissions is also appropriate:

> When we speak of admissions, without qualifying adjective, we customarily mean evidential admissions, that is, words oral or written, or conduct of a party or his representative offered in evidence against him. These evidential admissions are to be distinguished from judicial admissions. Judicial admissions are not evidence at all, but are formal admissions in the pleadings, or stipulations, oral or written, by a party or his counsel which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Thus the judicial admission, unless it should be allowed by the court to be withdrawn, is conclusive, whereas the evidential admission is not conclusive (unless the adversary should fail to meet it with contrary evidence) but is always subject to be contradicted or explained.

McCormick, s. 240.

Admissions continue as substantive evidence, *Leslie v. Knudson*, 205 Wis. 517, 522, 238 N.W. 397, 399 (1931), and as impeaching evidence, *Will of Ehlke*, 246 Wis. 654, 657, 18 N.W.2d 490, 491 (1945), *vacated* 247 Wis. 534, 19 N.W.2d 888, but require no foundation as other impeaching nonsubstantive evidence, *State v. Heidelbach*, 49 Wis. 2d 350, 359, 182 N.W.2d 497, 501 (1971); *Musha v. U.S. Fidelity & Guaranty Co.*, 10 Wis. 2d 176, 181, 102 N.W.2d 243, 247 (1960), and may constitute weak or strong evidence depending upon the circumstances, *Levandowski v. Studey*, 249 Wis. 421, 425, 25 N.W.2d 59, 61 (1946).

The competency of the person making the admission will go to the weight of the evidence, not its admissibility, by virtue of s. 906.01 (see comment).

Historically admissions have not been subject to the rule requiring first-hand knowledge, *Chapman v. C. & N.W. Ry. Co.*, 26 Wis. 295, 303, 7 Am. Rep. 81 (1870), nor has the opinion rule precluded admissions phrased in conclusory terms such as "fault," *Zigler v. Kinney*, 250 Wis. 338, 346, 27 N.W.2d 433, 437 (1947). Sections 906.02, 907.01 and 907.04 are not intended to alter the foregoing rules.

1. Wisconsin has not expressly held that to be admissible against a party in a representative capacity, proof must be established that the admission was made in a representative capacity. However, as pointed out by one commentator (Herriott, *"Admissions" Under the Model Code of Evidence and in Wisconsin*, 1945 Wis. L. Rev. 619, 621) the decision in *Fitzgerald v. Weston*, 52 Wis. 354, 9 N.W. 13 (1881), is incorrectly grounded but may be justified by the foregoing principle. If so justified, then Wisconsin law is altered.

Former s. 885.28 with its exclusion of some admissions by an injured party made within 72 hours of injury is a limitation on this rule and it is now found in s. 904.12.

2. Wisconsin is in accord. *Rude v. Algiers*, 11 Wis. 2d 471, 480, 105 N.W.2d 825, 830 (1960), *Schultz v. Culbertson*, 125 Wis. 169, 171, 103 N.W. 234, 235 (1905), inconsistent pleadings; *Gillett v. Phelps*, 5 Wis. 429 (1856), dominion and control; *Northern Elec. Mfg. Co. v. J.G. Wagner Co.*, 108 Wis. 584, 84 N.W. 894 (1901), payment contra; *Kelley v. Schupp*, 60 Wis. 76, 18 N.W. 725 (1884); *Mitler v. Associated Contractors*, 4 Wis. 2d 568, 91 N.W.2d 367 (1958), *Alex G. Goethel S.M.W. Co. v. American L.P. Co.*, 213 Wis. 248, 251 N.W. 474 (1933), *Gillette v. Manitowoc Church F. Co.*, 204 Wis. 145, 235 N.W. 438 (1931), *Borger v. McKeith*, 198 Wis. 315, 318, 224 N.W. 102, 103 (1929), *Mahoney v. Kennedy*, 188 Wis. 30, 205 N.W. 407 (1925), failure to reply or deny and silence.

Wisconsin cases also evidence concern with the equivocal nature of silence as an admission in civil cases, *Pawlowski v. Eskofski*, 209 Wis. 189, 197, 244 N.W. 611, 614 (1932), and particularly in criminal cases, *Gullickson v. State*, 256 Wis. 407, 411, 41 N.W.2d 291, 293 (1950), where evidence of silence is subject to *Miranda* proscriptions, *State v. Rice*, 37 Wis. 2d 392, 155 N.W.2d 116 (1967), *certiorari denied* 393 U.S. 878, 89 S. Ct. 180, 21 L. Ed.2d 152, *Galloway v. State*, 32 Wis. 2d 414, 147 N.W.2d 542 (1966).

3. Wisconsin cases have implied that evidentiary admissions by attorneys are admissions of the client, *Longville v. Leusman*, 48 Wis. 2d 251, 258, 179 N.W.2d 823, 826 (1970); *Schultz v. Mueller*, 39 Wis. 2d 216, 220, 159 N.W.2d 63, 65 (1968); *H. & R. Truck Leasing Co. v. Allen*, 26 Wis. 2d 158, 162, 131 N.W.2d 912, 914 (1965); however, the authority to make such evidentiary admissions must be established, 7 Am. Jur. 2d *Attorneys at Law* s. 122 (1963).

4. This provision is a change in Wisconsin law. Wisconsin cases *Shoemaker v. Marc's Big Boy*, 51 Wis. 2d 611, 617, 187 N.W.2d 815, 818 (1971); *Grunwald v. Halron*, 33 Wis. 2d 433, 439, n.2, 147 N.W.2d 543, 548, n.2 (1967); *Rudzinski v. Warner Theatres*, 16 Wis. 2d 241, 245, 114 N.W.2d 466, 468 (1962), have held that hearsay statements of an agent are not admissible against his principal as admissions unless the agent's statements were "within the scope of his authority to speak for his principal" (emphasis added). Note that in these cases the declarations were not qualified as a present sense impression or an excited utterance exception to the hearsay rule. This subsection would modify the phrase to read "concerning a matter within the scope of his agency or employment," *Burton v. Brown*, 219 Wis. 520, 263 N.W. 573, 574 (1935), and add the

condition that it be made during the existence of the relationship, *Estate of Leedom*, 218 Wis. 534, 539, 259 N.W. 721, 261 N.W. 683, 684 (1935). This change would be consistent with *Bogel v. Delaware, L. & W. Ry. Co.*, 168 Wis. 567, 573, 171 N.W. 198, 200 (1919). Another change would be the admission of an agent's statements to his principal, fellow agents or servants contrary to Restatement (Second) of Agency s. 287 (1957), quoted in *Rudzinski*. Note that the terms "agent or servant" applied to admissions embrace a partner's statement with respect to partnership affairs, s. 178.08; *Muench v. Heinemann*, 119 Wis. 441, 445, 96 N.W. 800, 802 (1903); a wife acting as agent for her husband, *Birdsall v. Dunn*, 16 Wis. 235 (1862); an officer with respect to the corporation's affairs, *State Med. Society v. Assoc. Hosp. Serv. Inc.*, 23 Wis. 2d 482, 492, 128 N.W.2d 43, 49 (1964).

5. Wisconsin cases agree that the statement must be made during the course of the conspiracy, *Boyce v. Independent Cleaners*, 206 Wis. 521, 529, 240 N.W. 132, 135 (1932); *Campbell v. Germania Fire Ins. Co.*, 163 Wis. 329, 340, 158 N.W. 63, 67 (1916); *Schultz v. Frankfort M., A & P. G. Ins. Co.*, 151 Wis. 537, 547, 139 N.W. 386, 390, 43 L.R.A., N.S., 520 (1913). Early Wisconsin cases hold that the statement must be made in furtherance of the conspiracy, *Pollack v. State*, 215 Wis. 200, 214, 253 N.W. 560, 566, *aff'd*, 215 Wis. 200, 254 N.W. 471 (1934). This comment appears in 405 Wis. J.I.—Criminal:

> Some of the older cases and general treatises on conspiracy state the rule as requiring the statements to be made during the conspiracy and "in furtherance of" the same. The committee feels that in the light of some of the more recent cases such as *State v. Adams*, 257 Wis. 433, 43 N.W.2d 446 (1950), it is no longer a requirement of admissibility that it be in furtherance of the conspiracy. *See also State v. Timm*, 244 Wis. 508, 517, 12 N.W.2d 670 (1944).

See also State ex rel. Tingley v. Hanley, 248 Wis. 578, 22 N.W.2d 510 (1946).

If the rationale of the Instructions Committee is correct, this subsection changes the law of Wisconsin by reinstating the requirement that the statement be in furtherance of the conspiracy.

Case Annotations

(1) Statement

State v. Kutz, 2003 WI App 205, ¶¶ 38–48, 267 Wis. 2d 531, 671 N.W.2d 660.

The intent of the speaker must be considered when determining whether an utterance is an "assertion" under Wis. Stat. § 908.01(1); an assertion must be intended by the speaker as an expression of a fact, opinion, or condition. As long as the speaker intended to express a fact, opinion, or condition, there is no reason to distinguish between explicit and implicit assertions. The burden is on a party claiming that an utterance contains an implicit assertion to show that a particular expression of fact, opinion, or condition was intended by a speaker.

In a prosecution for first-degree homicide, hiding a corpse, stalking, and obstructing an officer, the trial court did not err by denying the defendant's motion to exclude the victim's statement to her mother: "If I am not home in a half hour come looking for me." An utterance in the form of an instruction, such as the victim's, does not automatically mean that it is not an assertion, because the grammatical form of an utterance should not conclusively determine whether an utterance is intended by a speaker as an assertion within the meaning of Wis. Stat. § 908.01(1). Because a reasonable judge could have determined that the victim's instruction did not contain the implicit assertion that the defendant was dangerous, the trial court did not err by denying the defendant's motion to exclude the instruction on hearsay grounds.

State v. Patino, 177 Wis. 2d 348, 370–71, 502 N.W.2d 601 (Ct. App. 1993).

Absent a motive to mislead or distort, or some other indication of inaccuracy, when persons speaking different languages rely on a translator as a conduit for their communications, the translator's statements should be regarded as statements of the persons themselves without creating an additional layer of hearsay. Like any other out-of-court statement, the translator's statements are admissible, if qualified by an exception of the hearsay rule, without calling the translator as a witness. This rule applies whether the person making the statement is a party or a witness.

State v. Lomprey, 173 Wis. 2d 209, 215, 496 N.W.2d 172 (Ct. App. 1992).

A videotape that portrayed a child's conduct was a "statement" because the child witness intended to assert through her conduct that she feared the defendant. A child's testimony in a videotaped deposition held under Wis. Stat. § 967.04(7) is not hearsay but is the functional equivalent of live in-court testimony.

Authors' Note. The reasoning in *Lomprey* is puzzling; thus, the court's holding should be viewed with caution. Ordinarily depositions are hearsay and are received under Wis. Stat. § 804.07 or 967.04 or as a hearsay exception. For example, if the deposition in *Lomprey* were hearsay, the child's nonverbal conduct asserting fear of the defendant would be admissible as a statement of the declarant's existing state of mind, Wis. Stat. § 908.03(3), or as an excited utterance, Wis. Stat. § 908.03(2). Has *State v. Thomas*, 150 Wis. 2d 374, 442 N.W.2d 10 (1989) (*Thomas II*), muddied the waters?

(2) Declarant

State v. Zivcic, 229 Wis. 2d 119, 131, 598 N.W.2d 565 (Ct. App. 1999).

In a prosecution to determine whether an individual refused to provide a breath sample under Wisconsin's implied consent law, a printout indicating a "deficient sample" from a machine that detects the presence of alcohol is not hearsay, because the machine is not a "declarant" under Wis. Stat. § 908.01(2). Rather, the printout is the result of a process. A declarant is "a person who makes a statement."

(3) Hearsay

State v. Giacomantonio, 2016 WI App 62, ¶¶ 33–35, 371 Wis. 2d 452, 885 N.W.2d 394.

A law enforcement officer's recitation of text messages purportedly sent by the defendant to the victim's phone was not hearsay. The relevance of the text was not the truth of the matter asserted, i.e., that the defendant wanted the victim to come to his room, but to prove the fact and the timing of his contact with her.

Bank of Am. NA v. Neis, 2013 WI App 89, ¶ 49, 349 Wis. 2d 461, 835 N.W.2d 527.

Mortgages and promissory notes are not hearsay when they are offered as evidence of the documents' legal effect and not to prove the truth of the matter asserted.

State v. Kandutsch, 2011 WI 78, ¶¶ 52–64, 336 Wis. 2d 478, 799 N.W.2d 865.

A computer-generated report derived from an electronic monitoring device indicating the time the wearer of the device went out of range of the monitoring system is not hearsay.

Hearsay rules apply to statements made by persons, not to information that results from computer processes. Computer-stored records, which memorialize the assertions of human declarants, are hearsay because they could be the product of a lie, forgetfulness, or misunderstanding. Computer-generated records (e.g., a seismograph or Global Positioning System (GPS) data), which are the result of a process free from human intervention, are not hearsay.

State v. Kleser, 2010 WI 88, ¶¶ 87–97, 328 Wis. 2d 42, 786 N.W.2d 144.

In a reverse-waiver hearing for a juvenile under original adult-court jurisdiction for a first-degree intentional homicide offense, the circuit court improperly admitted a psychologist's recounting of the juvenile's description to her of the charged offense when the juvenile himself did not testify. The juvenile argued that he properly offered the psychologist's testimony for the limited purpose of demonstrating that the transfer of jurisdiction to juvenile court would not depreciate the seriousness of the offense (under the reverse-waiver statute, Wis. Stat. § 970.032(2)), but the court held that the testimony was inadmissible hearsay because the juvenile offered it for the truth of the matter asserted.

Ritt v. Dental Care Assocs., 199 Wis. 2d 48, 66–67, 543 N.W.2d 852 (Ct. App. 1995).

The portion of a plaintiff's affidavit that contained statements of the plaintiff's new treating dentist concerning the prior care provided by the defendant dentist was hearsay and inadmissible for the purpose of proving the truth of the matter asserted—that the defendant dentist had been negligent. However, the statement concerning the prior dentist's care was not hearsay when offered exclusively to prove the date on which the plaintiff discovered his injury for the purpose of opposing a statute-of-limitation defense.

Wester v. Bruggink, 190 Wis. 2d 308, 321, 527 N.W.2d 373 (Ct. App. 1994).

A traffic accident investigation manual offered for the purpose of impeaching an investigating officer's testimony as to point of impact of an accident was not hearsay because it was offered not for the truth of the matter asserted but for impeachment.

> ***Authors' Note.*** This holding recognizes that documents and treatises may be used to impeach expert witnesses without offending the hearsay rule. Although this is not the central holding of the case, the authors of this *Handbook* have chosen to include it because they believe that this practice is frequently misunderstood by lawyers and trial judges. Of course, before any document may be used, the document must be authenticated.

State v. Wilson, 160 Wis. 2d 774, 779, 467 N.W.2d 130 (Ct. App. 1991).

At a trial for burglary, it was error not to admit into evidence statements that the victim's roommate made to the defendant. The defendant sought to negate the intent element of the crime by showing that (based on the roommate's statements) he believed that he had the victim's consent to enter the apartment to get the property he was later accused of stealing. When a statement is offered for the fact that it was said, rather than for the truth of its content, it is not hearsay.

State v. Werlein, 136 Wis. 2d 445, 455, 401 N.W.2d 848 (Ct. App. 1987).

A conclusion based on statements made by others is inadmissible because it is based on out-of-court statements and thus is "hearsay."

Authors' Note. The authors believe this ruling is wrong. The conclusion by the witness was not hearsay; it was inadmissible, however, because it was an opinion that was not based on the perception of the witness. As such, it was not admissible under Wis. Stat. § 907.01 as lay opinion. Wis. Stat. § 906.02 excludes testimony if not based on personal knowledge, unless it is expert opinion under Wis. Stat. § 907.03.

State v. Rutchik, 116 Wis. 2d 61, 79, 341 N.W.2d 639 (1984).

It was error not to admit the transcript of a conversation between a witness and a police officer when the transcript was offered to rebut the suggestion that the answers were "fed" to the witness by the police officer. The purpose of offering the transcript was not to prove the truthfulness of the witness's assertions but to rebut the suggestion that they were fed to him. As such, the transcript was not hearsay and was admissible.

See also ....

Badger Produce Co. v. Prelude Foods Int'l, Inc., 130 Wis. 2d 230, 235–36, 387 N.W.2d 98 (Ct. App. 1986) (customer complaints admissible to show that complaints were made and that defendant acted in response to them)

State v. Curbello-Rodriguez, 119 Wis. 2d 414, 427, 351 N.W.2d 758 (Ct. App. 1984) (statement offered to show it was said was not hearsay)

(4) Statements Which Are Not Hearsay

(a) Prior Statement by Witness

1. Inconsistent Statements

State v. Nelis, 2007 WI 58, ¶¶ 32–33, 300 Wis. 2d 415, 733 N.W.2d 619.

In this prosecution for sexual assault, a police officer's testimony about an oral statement a witness made to him, describing that the witness had seen the defendant on top of the victim and that the victim was crying and bleeding at the time, was admissible as a nonhearsay prior inconsistent statement, the witness having earlier testified at trial that he did not see the defendant on top of the victim or remember seeing her crying or bleeding.

The oral statement the witness made to the police officer was admissible because the witness testified at trial concerning his statements to the police; he was subject to cross-examination; and the prior oral statement was inconsistent with his testimony at trial.

Authors' Note. The concurring opinion correctly pointed out that the majority ignored the requirement of Wis. Stat. § 908.01(4)(a) that the witness be "subject to cross-examination *concerning the statement*." (Emphasis added.) When the witness was cross-examined, the defendant had no knowledge of the prior inconsistent statement, it having been oral and not subject to discovery under the rules of criminal procedure. Nevertheless, the concurrence concluded that the statement was admissible because the trial record was not clear as to whether the witness was still available for cross-examination after the oral statement was disclosed through the police officer's testimony, and because the defendant failed to satisfy his burden of showing the unavailability of the witness. *Id.* ¶¶ 56–72 (Bradley, A.W., J., concurring).

Wikrent v. Toys "R" Us, Inc., 179 Wis. 2d 297, 309, 507 N.W.2d 130 (Ct. App. 1993), *overruled on other grounds by Steinberg v. Jensen*, 194 Wis. 2d 439, 534 N.W.2d 361 (1995).

The introduction of an out-of-court statement that is inconsistent with the declarant's trial testimony does not permit other out-of-court statements contemporaneously made to also be admitted, unless the doctrine of completeness requires their admission.

State v. Rochelt, 165 Wis. 2d 373, 387, 477 N.W.2d 659 (Ct. App. 1991).

Wis. Stat. § 908.01(4)(a)1. only applies if the declarant testifies at the trial. Admission of other hearsay statements made by the declarant does not implicate this statute.

Authors' Note. In footnote 8 in *Rochelt*, the court asked whether the common-law rule of curative admissibility survived adoption of the Wisconsin Rules of Evidence. That rule was discussed in detail in *Pruss v. Strube*, 37 Wis. 2d 539, 544, 155 N.W.2d 650 (1968) ("[T]he opponent may reply with similar [inadmissible] evidence only when it is needed to remove an unfair prejudice which might otherwise ensue from the original evidence.").

State v. Whiting, 136 Wis. 2d 400, 421, 402 N.W.2d 723 (Ct. App. 1987).

The statement that the defendant admitted committing the crime, which was made by a third party to a police officer, was admissible even though the third party testified that he could not remember making a statement to that police officer. It is within the discretion of the trial court to declare a denial of memory "inconsistent testimony."

Virgil v. State, 84 Wis. 2d 166, 180, 267 N.W.2d 852 (1978).

Minor and irrelevant inconsistencies in a statement are not sufficient to render a statement inconsistent and thus are not admissible under Wis. Stat. § 908.01(4)(a)1.

State v. Lenarchick, 74 Wis. 2d 425, 436, 247 N.W.2d 80 (1976).

If a witness denies recollection of a prior statement, and the trial judge has reason to doubt the good faith of that denial, the judge may, in the judge's discretion, declare such testimony inconsistent and permit the prior statement in evidence.

See also ....

Vogel v. State, 87 Wis. 2d 541, 550, 275 N.W.2d 180 (Ct. App. 1979), *aff'd*, 96 Wis. 2d 372, 384, 291 N.W.2d 838 (1980) (prior inconsistent statement is admissible as substantive evidence)

2. Consistent Statements

State v. Meehan, 2001 WI App 119, ¶ 25, 244 Wis. 2d 121, 630 N.W.2d 722.

In a prosecution for second-degree sexual assault of a child and attempted second-degree sexual assault of a child, it was inappropriate to permit the state, after the victim's live testimony, to read into the record the transcripts of the victim's testimony from earlier legal proceedings, because under Wis. Stat. § 908.01(4)(a)2. some of the prior testimony was inconsistent, some of it was not covered by the victim during his live testimony, and it was not offered to rebut an express or implied claim of recent fabrication or improper influence or motive.

State v. Miller, 231 Wis. 2d 447, 467–71, 605 N.W.2d 567 (Ct. App. 1999).

A prior consistent statement of a witness is not hearsay if, among the other elements of the test in Wis. Stat. § 908.01(4)(a), the declarant testifies at trial and is subject to cross-examination concerning the statement. That the declarant is not actually cross-examined is not dispositive. The requirement that the declarant be "subject to cross-examination concerning the statement" simply means that the opponent had the opportunity to cross-examine the declarant on the prior statement.

Ansani v. Cascade Mountain, Inc., 223 Wis. 2d 39, 52–54, 588 N.W.2d 321 (Ct. App. 1998).

A witness could testify that the plaintiff's friend told her on the day of the plaintiff's accident that the defendant ski resort did not have a protective fence around an object that the plaintiff struck while skiing, when the friend had already testified to that effect at trial, and the cross-examination of the friend suggested that he had collaborated with other witnesses to support the plaintiff's claim with their testimony.

State v. Street, 202 Wis. 2d 533, 550–51, 551 N.W.2d 830 (Ct. App. 1996).

Consistent statements made by children to a psychotherapist and an investigating officer regarding their sexual assault, made before allegations that their videotaped depositions were coached, were admissible. Prior consistent out-of-court statements, in order to be admissible to rebut a charge of recent fabrication, improper influence or improper motive, must have been made before the alleged fabrication, influence, or motive came into being.

State v. Mainiero, 189 Wis. 2d 80, 101, 525 N.W.2d 304 (Ct. App. 1994).

In a prosecution for improper sexual contact, a witness's testimony regarding the victim's prior consistent statements was inadmissible hearsay, because the defendant's question to the witness whether the victim ever stated that the defendant had sexual intercourse with the victim did not expressly or impliedly charge a recent fabrication or improper influence or motive.

State v. Mares, 149 Wis. 2d 519, 525–27, 439 N.W.2d 146 (Ct. App. 1989).

If the consistent statements precede the events of alleged fabrication and improper influence, they are properly admitted as prior consistent statements. The fact that the witness had a prior motive to lie is irrelevant so long as the three requirements of Wis. Stat. § 908.01(4)(a)2. are met. Those requirements are that (1) the declarant testify at trial and be subject to cross-examination concerning the statement; (2) the statement is consistent with the declarant's testimony; and (3) the statement rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

State v. Lindner, 142 Wis. 2d 783, 796–97, 419 N.W.2d 352 (Ct. App. 1987).

When the cross-examination suggested that the witness had rehearsed her testimony with the prosecutor, the trial court did not erroneously exercise its discretion by allowing rebuttal evidence of a prior consistent statement that the victim had made to the authorities shortly after the assault.

The videotaped testimony of a witness taken before the judge with all counsel present and full opportunity for cross-examination meets the threshold requirement of Wis. Stat. § 908.01(4)(a) that "the declarant testif[y] at trial."

State v. Gershon, 114 Wis. 2d 8, 11, 337 N.W.2d 460 (Ct. App. 1983).

Wis. Stat. § 908.01(4)(a)2. allows the use of prior consistent statements for substantive purposes. This differs substantially from the use of prior consistent statements on the issue of credibility. The prerequisites of rebutting a charge of recent fabrication or of identification do not apply when prior consistent statements are being offered on the issue of credibility.

Authors' Note. The exception created by *Gershon* appears to entirely vitiate this rule. The authors believe that *Gershon* should be strictly construed to its facts and not be seen as an attempt by the court to radically increase the opportunity for the use of prior consistent statements. Indeed, later cases apply the rule's requirement that the statement be offered to rebut a charge of improper influence or recent fabrication.

See also ....

State v. Peters, 166 Wis. 2d 168, 177, 479 N.W.2d 198 (Ct. App. 1991) (holding that contention in opening remarks that defendant's version of events would be truthful was not equivalent to charging victim with recent fabrication)

Thomas v. State, 92 Wis. 2d 372, 390, 284 N.W.2d 917 (1979) (one precondition for admission of prior statement offered to rebut charge of fabrication or improper influence is defendant's opportunity to cross-examine witness concerning statement)

Green v. State, 75 Wis. 2d 631, 640, 250 N.W.2d 305 (1977) (prior consistent statements admissible only if express or implied charge of recent fabrication or improper influence or motive or if testimony concerns identification and was made soon after perceiving the person identified)

3. Identification

State v. Jenkins, 168 Wis. 2d 175, 191, 483 N.W.2d 262 (Ct. App. 1992).

This rule is limited to identification and does not extend to descriptions of the event that underlie the criminal charge.

State v. Williamson, 84 Wis. 2d 370, 389, 267 N.W.2d 337 (1978), *overruled on other grounds by Manson v. State*, 101 Wis. 2d 413, 304 N.W.2d 729 (1981).

All statements of identification made soon after perceiving the suspect or the suspect's likeness in the identification process are admissible.

(b) Admission by Party Opponent

1. Party's Statement

State v. Hanson, 2019 WI 63, ¶¶ 19–27, 387 Wis. 2d 233, 928 N.W.2d 607.

Portions of a defendant's John Doe hearing testimony, containing three different out-of-court statements, were properly admitted as evidence at the defendant's trial for homicide. One statement was admitted as nonhearsay as an admission of a party opponent, and the remaining two statements were admitted as nonhearsay because they were not offered for the truth of the matter asserted but to show the defendant's consciousness of guilt.

Wosinski v. Advance Cast Stone Co., 2017 WI App 51, ¶¶ 45–53, 377 Wis. 2d 596, 901 N.W.2d 797.

A statement made by an agent for a party met the criteria for an admission of a party opponent and was therefore not hearsay. Nevertheless, when the trial court was concerned about the trustworthiness of the statement, it properly exercised its discretion in instructing the jury that the statement could be considered only as to the agent's credibility, not for the truth of the assertion.

State v. Cardenas-Hernandez, 219 Wis. 2d 516, 525–34, 579 N.W.2d 678 (1998).

A defendant in a criminal proceeding may introduce into evidence, as an admission by a party opponent under Wis. Stat. § 908.01(4)(b), an unsworn statement made by a prosecutor in a prior criminal proceeding, if a three-part test is satisfied. Under this test, the court must (1) be satisfied that the prior statement is an assertion of fact that is inconsistent with the assertion of a later trial; (2) determine that the statement is the equivalent of a testimonial statement by the defendant; and (3) determine by a preponderance of the evidence, in a hearing outside the presence of the jury, that the inference that the prosecution seeks to draw from the inconsistency is a fair one and that an innocent explanation does not exist.

Pattermann v. Pattermann, 173 Wis. 2d 143, 153, 496 N.W.2d 613 (Ct. App. 1992).

Generally, the admissions of one coplaintiff or codefendant are not receivable against another merely by virtue of the person's position as a coparty in the litigation.

Kraemer Bros. v. United States Fire Ins. Co., 89 Wis. 2d 555, 569, 278 N.W.2d 857 (1979).

Admissions are the words of a party admitted against that party and come in as substantive evidence of the facts admitted. A positive statement of evidentiary fact made by a pleading in another case may be sufficient to constitute an admission.

State v. Johnson, 74 Wis. 2d 26, 36–38, 245 N.W.2d 687 (1976).

Admissions against interest are only admissible when the declarant is unavailable. *See* Wis. Stat. § 908.045(4). It is important to distinguish admissions that are not hearsay under Wis. Stat. § 908.01(4)(b)1. from statements against interest that are hearsay but are admissible as exceptions to the rule under certain circumstances. Although most admissions are actually against interest when made, there is no requirement that they be so. By definition, admissions are made by a party to a lawsuit and must be offered against the party. On the other hand, declarations against interest need not be, and usually are not, made by a party.

Merely because admissions were admitted does not create a correlative right to introduce beneficial statements on cross-examination. The Wisconsin Rules of Evidence do not allow for such symmetry.

Authors' Note. But see Wis. Stat. § 901.07 on the rule of completeness.

Lambert v. State, 73 Wis. 2d 590, 605–06, 243 N.W.2d 524 (1976).

A witness's failure to assert a fact when it would have been natural to do so amounts to an assertion of the nonexistence of the fact.

Authors' Note. A nonverbal act is an assertion, and thus a "statement" within the meaning of Wis. Stat. § 908.01(1), only if it is intended as an assertion. If it is a statement, it may be admissible against a party as an admission, used against a witness or a party as a prior inconsistent statement, or a prior consistent statement, or a statement of prior identification, or used if it falls within any other exception to the rule against hearsay.

See also ....

State v. Arroyo, 166 Wis. 2d 74, 79, 479 N.W.2d 549 (Ct. App. 1991) (statements made in Spanish to Spanish-speaking police officer admissible; questions as to officer's ability to understand and report accurately go to testimony's weight)

State v. Robles, 157 Wis. 2d 55, 61–63, 458 N.W.2d 818 (Ct. App. 1990) (statements made to interpreter and relayed to interrogator are not inadmissible double hearsay pursuant to Wis. Stat. § 908.05; interpreter becomes defendant's agent, and translation is attributable to defendant as own admission), *aff'd on different grounds sub nom*. *State v. Martin*, 162 Wis. 2d 883, 470 N.W.2d 900 (1991)

State v. Johnson, 121 Wis. 2d 237, 255–56, 358 N.W.2d 824 (Ct. App. 1984) (defendant's statement six months before incident that he would shoot anyone who interrupted him in course of a robbery was admissible)

State v. Benoit, 83 Wis. 2d 389, 402, 265 N.W.2d 298 (1978) (out-of-court statements by party admissible against party at trial, even if not "against interest," because they are not hearsay)

2. Statement Adopted by a Party

State v. Rogers, 196 Wis. 2d 817, 833–34, 539 N.W.2d 897 (Ct. App. 1995).

There must be facts that support a reasonable conclusion that a defendant purposefully has embraced the truth of someone else's statement as a condition precedent to finding an adoptive admission. A defendant's reference to someone else's statement does not indicate that the defendant manifested an adoption of the statement. A defendant's declaration that he wished to kill the state's witness because the witness "snitched him out" does not mean that the defendant "adopted" the witness's statements that implicated the defendant in the crime. If the witness had falsely accused the defendant, the defendant may still wish for revenge. Thus, this was not a "purposeful" adoption because it did not indicate the defendant's belief in the truthfulness, or adoption, of the witness's earlier statements.

See also ....

Caccitolo v. State, 69 Wis. 2d 102, 110, 230 N.W.2d 139 (1975) (one's failure to deny statement spoken in one's presence when natural to do so is admissible adoptive admission)

3 Authorized Person's Statement

State v. Cardenas-Hernandez, 214 Wis. 2d 71, 89–90, 96–97, 571 N.W.2d 406 (Ct. App. 1997), *aff'd*, 219 Wis. 2d 516, 579 N.W.2d 678 (1998).

An attorney may, under certain circumstances, be considered "a person authorized by the party to make a statement concerning the subject." However, the scope of this rule is particularly narrow for admissions made by governmental employees, such as prosecutors. In only very

restricted situations, statements made by a prosecutor, not under oath, in a prior court proceeding may be considered, for evidentiary purposes, admissions under this section.

4. Statement Within Scope of Agency

City of Stoughton v. Thomasson Lumber Co., 2004 WI App 6, ¶¶ 21–25, 269 Wis. 2d 339, 675 N.W.2d 487.

Admissions of a party in a complaint in another case were admissible as nonhearsay.

In an action for breach of implied warranty, the trial court did not erroneously exercise its discretion admitting this evidence; the pleading was admissible under Wis. Stat. § 908.01(4)(b)4. because it was a statement made by a party's agent within the scope of agency and offered against the party, and a reasonable court could have decided that the evidence was relevant.

Jenzake v. City of Brookfield, 108 Wis. 2d 537, 545, 322 N.W.2d 516 (Ct. App. 1982).

Statements by two city employees that a sewer backup was caused by the city's negligence constituted admissions within the scope of agency, when there was proof of the employees' identification and that they were sent to investigate the cause of the backup.

Mercurdo v. County of Milwaukee, 82 Wis. 2d 781, 791, 264 N.W.2d 258 (1978).

There is no requirement that a statement be authorized by the defendant if the person making the statement is the defendant's agent and the statement concerns a matter within the scope of the person's agency or employment and was made during the existence of the agency relationship. Note that such an admission is binding on the principal only if it is made during the course of the agency relationship.

5. Co-conspirator Statement

State v. Savanh, 2005 WI App 245, ¶¶ 13–16, 287 Wis. 2d 876, 707 N.W.2d 549.

An out-of-court statement made by a co-conspirator in furtherance of the conspiracy is not hearsay. "A statement is made 'in furtherance of the conspiracy' when the statement is part of the information flow between conspirators intended to help each perform his or her role." In this prosecution for delivery and possession of cocaine, a police informant's testimony that he heard a nontestifying accomplice of the defendant say on the telephone to the defendant, "We have to go get a pack of cocaine," was admissible under this section.

State v. Whitaker, 167 Wis. 2d 247, 262, 481 N.W.2d 649 (Ct. App. 1992).

In a first-degree reckless homicide trial, a police officer's testimony relating a co-conspirator's statement "you got one," which was initially expressed when the co-conspirator observed the defendant shoot a gun at rival gang members, was, when considered with other evidence in the case, a statement made during the course and in furtherance of a conspiracy with the defendant and therefore was admissible under this section.

Wis. Stat. § 901.04(1) vitiates *State v. Dorcey*, 103 Wis. 2d 152, 307 N.W.2d 612 (1981), and permits an out-of-court declaration by a party's alleged co-conspirator to be considered by the trial court in determining whether there was a conspiracy.

State v. Webster, 156 Wis. 2d 510, 518–19, 458 N.W.2d 373 (Ct. App. 1990).

A co-conspirator's statement that is not hearsay as provided by this subsection may be admitted into evidence without proof of the declarant's unavailability and without a showing of a particular indicia of reliability. The declarant's availability in this case did not matter, because the statements depended for their reliability on the fact that they were made while the conspiracy was in progress. Such evidence cannot be replicated in court.

908.02 Hearsay rule.

Hearsay is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute.

Judicial Council Committee's Note (1974)

The following examples illustrate exceptions:

262.17: Proof of service of summons, defendant appearing in action.
262.18: Judgment against nonappearing defendant; proof of jurisdiction.
268.02: Temporary injunction; when granted.
268.025: Ex parte restraining orders.
268.08: Injunction, defendant may be heard before enjoined.
269.32: Motions and orders; service of papers.
269.42: Papers, where filed.
269.45: Enlargement of time.

270.635: Summary judgments.
887.12(7): Use of depositions.
887.27(5): Deposition when used.
887.30(4): Scope; use at trial.
967.04(5): Depositions in criminal proceedings.

Authors' Note. Wis. Stat. § 970.038(1) provides that hearsay is admissible in a preliminary examination.

Case Annotations

State v. O'Brien, 2014 WI 54, ¶¶ 3–4, 354 Wis. 2d 753, 850 N.W.2d 8.
Wis. Stat. § 970.038, which creates a hearsay exception at preliminary examinations, is constitutional. The scope of preliminary examinations is limited to determining whether there is probable cause to believe the defendant has committed a felony. The admission of hearsay evidence at a preliminary examination does not impede the defendant's rights to compulsory process, effective assistance of counsel, or due process. Circuit courts remain the evidentiary gatekeepers by determining the reliability of the state's hearsay evidence.

State v. Brown (In re Commitment of Brown), 2004 WI App 33, ¶¶ 13–14, 269 Wis. 2d 750, 676 N.W.2d 555, *rev'd on other grounds*, 2005 WI 29, 279 Wis. 2d 102, 693 N.W.2d 715.
The physician's report ordered by the court pursuant to Wis. Stat. § 980.08(3) and filed with the court, although hearsay, is admissible by statute.

State v. Peters, 166 Wis. 2d 168, 174, 479 N.W.2d 198 (Ct. App. 1991).
The proponent of hearsay testimony has the burden of proving that the evidence fits into a specific exception to the hearsay rule.

State v. Werlein, 136 Wis. 2d 445, 455, 401 N.W.2d 848 (Ct. App. 1987).
A conclusion based on statements made by others is inadmissible because it is based on out-of-court statements and thus is hearsay.

Authors' Note. The authors believe this ruling is wrong. The conclusion by the witness was not hearsay; it was inadmissible, however, because it was an opinion that was not based upon the perception of the witness. As such, it was not admissible under Wis. Stat. § 907.01 or 906.02.

See also ....

R.S. v. Milwaukee Cnty. (In re Guardianship of R.S.), 162 Wis. 2d 197, 207, 470 N.W.2d 260 (1991) (report by a licensed physician or psychologist, even though required by former Wis. Stat. § 880.33(1) (now Wis. Stat. § 54.36(1)), is inadmissible hearsay in guardianship action)

Chapter 26
Hearsay Exceptions—Declarant Availability Immaterial

908.03 Hearsay exceptions; availability of declarant immaterial.
The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) PRESENT SENSE IMPRESSION. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) EXCITED UTTERANCE. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not

including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made when the matter was fresh in the witness's memory and to reflect that knowledge correctly.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02(12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

(6m) Patient health care records.

(a) *Definition.* In this subsection:

1. "Health care provider" has the meanings given in ss. 146.81(1) and 655.001(8).

2. "Patient health care records" has the meaning given in s. 146.81(4).

(b) *Authentication witness unnecessary.* A custodian or other qualified witness required by sub. (6) is unnecessary if the party who intends to offer patient health care records into evidence at a trial or hearing does one of the following at least 40 days before the trial or hearing:

1. Serves upon all appearing parties an accurate, legible and complete duplicate of the patient health care records for a stated period certified by the record custodian.

2. Notifies all appearing parties that an accurate, legible and complete duplicate of the patient health care records for a stated period certified by the record custodian is available for inspection and copying during reasonable business hours at a specified location within the county in which the trial or hearing will be held.

(bm) *Presumption.* Billing statements or invoices that are patient health care records are presumed to state the reasonable value of the health care services provided and the health care services provided are presumed to be reasonable and necessary to the care of the patient. Any party attempting to rebut the presumption of the reasonable value of the health care services provided may not present evidence of payments made or benefits conferred by collateral sources.

(c) *Subpoena limitations.* Patient health care records are subject to subpoena only if one of the following conditions exists:

1. The health care provider is a party to the action.

2. The subpoena is authorized by an ex parte order of a judge for cause shown and upon terms.

3. If upon a properly authorized request of an attorney, the health care provider refuses, fails, or neglects to supply within 2 business days a legible certified duplicate of its records for the fees under s. 146.83(1f) or (3f), whichever are applicable.

(7) Absence of entry in records of regularly conducted activity. Evidence that a matter is not included in the memoranda, reports, records or data compilations, in any form, of a regularly conducted activity, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with s. 909.02, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, whether a child is marital or nonmarital, ancestry, relationship by blood, marriage or adoption, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence 20 years or more whose authenticity is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in the writer's profession or calling as an expert in the subject.

(a) No published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art may be received in evidence, except for impeachment on cross-examination, unless the party proposing to offer such document in evidence serves notice in writing upon opposing counsel at least 40 days before trial. The notice shall fully describe the document which the party proposes to offer, giving the name of such document, the name of the author, the date of publication, the name of the publisher, and specifically designating the portion thereof to be offered. The offering party shall deliver with the notice a copy of the document or of the portion thereof to be offered.

(b) No rebutting published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art shall be received in evidence unless the party proposing to offer the same shall, not later than 20 days after service of the notice

described in par. (a), serve notice similar to that provided in par. (a) upon counsel who has served the original notice. The party shall deliver with the notice a copy of the document or of the portion thereof to be offered.

(c) The court may, for cause shown prior to or at the trial, relieve the party from the requirements of this section in order to prevent a manifest injustice.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, relationship by blood, adoption, or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of this personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among the person's associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a plea of no contest), adjudging a person guilty of a felony as defined in ss. 939.60 and 939.62(3)(b), to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

Judicial Council Notes (1990)

Subsection (6m) is amended to extend the self-authentication provision to other health care providers in addition to hospitals. That such records may be authenticated without the testimony of their custodian does not obviate other proper objections to their admissibility. The revision changes the basic self-authentication procedure for all health care provider records (including hospitals) by requiring the records to be served on all parties or made reasonably available to them at least 40 days before the trial or hearing. The additional 30 days facilitates responsive discovery, while elimination of the filing requirement reduces courthouse records management impacts.

Judicial Council Committee's Note (1974)

Note that this section considers these exceptions to be possessed of sufficient guarantees of circumstantial trustworthiness to eliminate the need for production of the declarant or conversely to establish the practical unavailability of the declarant. Evidence of the kind hereinafter described in the various exceptions does not automatically become admissible. Admissibility continues to be subject to the various rules of relevancy, competency, authentication, etc.

Sub. (1) and (2). The substance of these subdivisions is in accord with Model Code Rule 512 which was held to be a statement of the law in Wisconsin in *Rudzinski v. Warner Theatres*, 16 Wis. 2d 241, 247, 114 N.W.2d 466, 469 (1962). Earlier as well as later cases, *Shoemaker v. Marc's Big Boy*, 51 Wis. 2d 611, 617, 187 N.W.2d 815, 818 (1971); *Wilder v. Classified Risk Ins. Co.*, 47 Wis. 2d 109, 177 N.W.2d 109, 113 (1970); *Cossette v. Lepp*, 38 Wis. 2d 392, 157 N.W.2d 629 (1968); *Cornwell v. Rohrer*, 38 Wis. 2d 252, 156 N.W.2d 373 (1968); *Scrafield v. Rudy*, 266 Wis. 530, 532, 64 N.W.2d 189, 190 (1954); *Pocquette v. Carpiaux*, 261 Wis. 340, 343, 52 N.W.2d 787, 789 (1952), are in accord with these exceptions and the underlying circumstances of trustworthiness analyzed in the Federal Advisory Committee's Note. Note that although *Rudzinski*, *supra*, and *Shoemaker*, *supra*, refer to the need for contemporaneity of the event and the expression of sense impression, *State v. Smith*, 36 Wis. 2d 584, 594, 153 N.W.2d 538, 543 (1967), acknowledges that a hearsay statement made contemporaneously, or nearly contemporaneously, with the observation of an event or condition is inadmissible. The time element is more narrowly measured under sub. (1) than sub. (2) to assure a circumstance of trustworthiness. In the latter subdivision, time is also important but measured by the duration of the condition of excitement rather than mere time lapse from the event or condition described. *Bertrang v. State*, 50 Wis. 2d 702, 707, 184 N.W.2d 867, 870 (1971), may be an illustration of this approach or a special exception to the hearsay rule. See note to sub. (24). Note that

exception (2) has been expanded by use of the term "relating" to a startling event or condition rather than the Model Code provision, which is restricted to a statement which narrates or describes or explains the startling event or condition.

This section abandons use of the term "res gestae" in connection with the hearsay rule. The use of the term may not justify the excoriation by Justice Holmes and Judge Learned Hand (E. Morgan, Basic Problems of Evidence, 328, n.242 (1942)) but "can well be jettisoned" in the interest of more precise analysis. McCormick section 288. The term "res gestae" if correctly used in connection with evidence law embraces circumstantial proof that is not hearsay at all, as well as hearsay that is admissible under subdivisions (1) to (3) of this section.

Sub. (3). This exception is a specialized version of the present sense impression exception, sub. (1). A special exception is desirable because of widespread reluctance to accept declarations of a state of mind or bodily health to prove the condition because of the problem of trustworthiness. However, legal authorities have determined that the merit of such a position is directed to the weight and sufficiency of the evidence and the credibility of the declarant, not to the admissibility of the statement. *Lager v. DILHR*, 50 Wis. 2d 651, 660, 185 N.W.2d 300, 305 (1971); *Charley v. Potthoff*, 118 Wis. 258, 266, 95 N.W. 124, 126 (1903); *Bates v. Abelman*, 13 Wis. 644, 650 (1861). The foregoing cases refer specifically to intent, plan and design. Statement of motive and purpose are also admissible, *Mack v. State*, 48 Wis. 271, 280, 4 N.W. 449, 456 (1880); as are statements of then existing mental feeling, pain and bodily health, *Bredlau v. York*, 115 Wis. 554, 92 N.W. 261 (1902); *Keller v. Gilman*, 93 Wis. 9, 66 N.W. 800 (1896); *Academy of Music Co. v. Davidson*, 85 Wis. 129, 55 N.W. 172 (1893); *McKeigue v. City of Janesville*, 68 Wis. 50, 31 N.W. 298 (1887).

Many of the decisions which developed the common law in this area failed to distinguish hearsay declarations admissible under this exception and (1) writings and utterances as operative facts or showing the effect upon the reader or hearer, *Woodhull v. State*, 43 Wis. 2d 202, 214, 168 N.W.2d 281, 287 (1969); (2) declarations or conduct to show circumstantially the knowledge, feelings, or state of mind of the declarant. The foregoing are circumstantial evidence, not hearsay. The distinction is fine and frequently overlooked. A quotation from McCormick section 294, is pertinent:

> The substantive law often makes legal rights and liabilities hinge upon the existence of a state of mind in a person involved in the transaction at issue. When this is so and a legal proceeding arises from the transaction, the mental state of the person becomes an ultimate object of search. It is not sought to be proved as circumstantial evidence of the person's earlier or later conduct but as an operative fact upon which a cause of action or defense depends. While such a state of mind may be proved by the person's actions, the declarations of the person whose state of mind is at issue are often a primary source of evidence on this matter. In most cases, the declarations are not assertive of the declarant's present state of mind and are therefore not necessarily within the hearsay exclusionary rule. Courts however, have tended to lump together declarations asserting the declarant's state of mind with those tending to prove the state of mind circumstantially, and have developed a general exception to the hearsay rule for them without regard to the possibility that many could be treated simply as nonhearsay.

Doern v. Crawford, 36 Wis. 2d 470, 476, 153 N.W.2d 581, 585 (1967) illustrates the absence of distinction. The substantive law required determination of the declarant's intention to return to his home. His declaration that he didn't like being away from his wife and his inquiry whether his wife would be willing to let him return home were not hearsay because they were not assertive of his present state of mind and thus were circumstantial evidence from which intention might be inferred. However, declarant's statement to his attorney that he was starting a divorce action to "shake up his wife so she would fly right, didn't want a divorce and would dismiss the action after it had accomplished the purpose," was hearsay because it was a statement of his present state of mind. *Bridges v. State*, 247 Wis. 350, 364 to 66, 19 N.W.2d 529, 534 to 536 (1945), illustrates the fine distinction, although it is not acknowledged in the opinion. The decision is on the borderline between a finding that the declarant's statements were not hearsay and admissible because nonassertive of present state of mind and thus circumstantial evidence of knowledge, or that it was a statement of present state of mind to prove the fact remembered or believed and thus inadmissible because not within the hearsay exception. Morgan sees it as the latter, Morgan, *The Law of Evidence*, 1941-1945, 59 Harv. L. Rev. 481, 544 (1946); McCormick sees it as the former, McCormick section 249.

The early Wisconsin cases that admit statements of then existing mental feeling, pain and bodily health tend to confuse excited utterances with declarations of pain and seem unnecessarily restrictive. The only required condition is that the pain be then existing and it, of course, should be a spontaneous declaration rather than a solicited statement that has lost its spontaneity. The latter element is reflected in the decisions that fear a "narrative" of the declarant's complaints or state of mind. Statements with reference to bodily health to lay persons are admitted under this exception and have never been limited to those made to a doctor or one acting under his authority as originally required for statements admissible under exception (4).

In *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 12 S. Ct. 909, 36 L.Ed. 706 (1892), a declaration of then-existing state of mind (intention) was held admissible as tending to prove the doing of the act intended. However, in *Shepard v. United States*, 290 U.S. 96, 54 S. Ct. 22, 78 L.Ed. 196 (1933), the court held that a declaration of the victim that the defendant poisoned her did not establish the prior act, saying:

> Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. These would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.

Thus the exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to comply with the limits prescribed. Wisconsin's adherence to that doctrine is evidenced in *Grunwald v. Halron*, 33 Wis. 2d 433, 147 N.W.2d 543 (1967), which held that declarations of an agent as to past events are not admissible to prove such events. *Also see Kamp v. Coxe Bros. & Co.*, 122 Wis. 206, 212, 99 N.W. 366, 368 (1904).

Carved out of the above-mentioned exclusion is the special situation of a testator's declarations with respect to execution, revocation, identification, or terms of declarant's will. The special circumstances of necessity and trustworthiness are discussed in McCormick section 296. The admissibility of such declarations in cases involving lost wills or genuineness of signature is acknowledged in Wisconsin. *Will of Oswald*, 172 Wis. 345, 349, 178 N.W. 462, 464 (1920); *Estate of Johnson*, 170 Wis. 436, 453, 175 N.W. 917, 924 (1920); *Gavitt v. Moulton*, 119 Wis. 35, 50, 96 N.W. 395, 400 (1903); *In re Valentine's Will*, 93 Wis. 45, 53, 67 N.W. 12, 14 (1896). However, in *Estate of Melville*, 234 Wis. 327, 331, 291 N.W. 382, 383 (1940), the doctrine may have been extended to revocation of a will. Thus, this rule expands the application of the doctrine in Wisconsin but not in a fashion that is inconsistent with the cited cases.

Sub. (4). This exception is generally consistent with recent Wisconsin cases, *Erdmann v. Frazin*, 39 Wis. 2d 1, 158 N.W.2d 281 (1968); *Cossette v. Lepp*, 38 Wis. 2d 392, 157 N.W.2d 629 (1968); *Felkl v. Classified Risk Ins. Corp.*, 24 Wis. 2d 595, 129 N.W.2d 222 (1964); *Ritter v. Coca-Cola Co.*, 24 Wis. 2d 157, 128 N.W.2d 439 (1964); *Thompson v. Nee*, 12 Wis. 2d 326, 107 N.W.2d 150 (1961); *Kraut v. State*, 228 Wis. 386, 280 N.W. 327 (1938); *Mader v. Boehm*, 213 Wis. 55, 250 N.W. 854 (1933), followed in 213 Wis. 62, 250 N.W. 856; *Maine v. Maryland Casualty Co.*, 172 Wis. 350, 178 N.W. 749, 15 A.L.R. 1536 (1920); however it is a major change in Wisconsin law in permitting a doctor to relate the patient's statements of past or present symptoms or history including statements of the character or external source of the cause insofar as reasonably pertinent to diagnosis or treatment. As indicated in the Federal Advisory Committee Note, this rule would permit a doctor who was consulted only for the purpose of his testimony to relate such statements whether made to him or others. It should be noted, however, that statements made to others must be qualified for admission under the multiple hearsay rule s. 908.05. Consistency in the treatment of expert testimony under s. 907.03 requires this change. Wisconsin has already permitted the indirect reception of similar statements as the basis for an expert opinion, *Rivera v. Wollin*, 30 Wis. 2d 305, 140 N.W.2d 748 (1966), (it is admitted as nonhearsay because not offered to prove the truth of the statements) and acknowledge the propriety of a doctor basing his medical opinion upon reports of others, *Huss v. Vande Hey*, 29 Wis. 2d 34, 138 N.W.2d 192 (1965); *Chapnitsky v. McClone*, 20 Wis. 2d 453, 122 N.W.2d 400 (1963); *Sundquist v. Madison Rys. Co.*, 197 Wis. 83, 221 N.W. 392 (1928); *Leora v. Minneapolis, St. P. & S.S.M. Ry. Co.*, 156 Wis. 386, 146 N.W. 520 (1914), *error dismissed* 235 U.S. 694, 35 S. Ct. 208, 59 L.Ed. 429. In *Roberts v. State*, 41 Wis. 2d 537, 164 N.W.2d 525 (1969), and *Vinicky v. Midland Mut. Casualty Ins. Co.*, 35 Wis. 2d 246, 151 N.W.2d 77 (1967), approval was expressed of a medical expert's reliance upon a type of data reasonably relied upon by experts in the particular field although hearsay, and commented favorably upon McCormick's view which supports the rule. The approval expressed in those cases, however, did not extend so far as to permit a medical diagnosis to be received in evidence through hospital records admitted under the "Regularly Conducted Activity" exception sub. (6), *Gibson v. State*, 55 Wis. 2d 110, 197 N.W.2d 813 (1972), nor does this exception go that far. (See subsection (6) *infra*.)

Ample authority to prevent abuse of this rule by experts is found in s. 907.06, permitting the court appointment of experts.

Sub. (5). This exception is consistent with *Harper, Drake & Assocs. v. Jewett & Sherman Co.*, 49 Wis. 2d 330, 342, 182 N.W.2d 551, 558 (1971) and *Lisowski v. Chenenoff*, 37 Wis. 2d 610, 626, 155 N.W.2d 619, 627 (1968). Wisconsin permits the receipt of the memorandum or record in evidence upon the proponent's offer. The federal rule provision that the memorandum may be read into evidence by proponent's witness but may not be received as an exhibit unless offered by an adverse party has been deleted. Ample protection from undue emphasis upon the statement is found in the discretionary authority of the trial judge to keep exhibits from the juryroom. *Rodriquez v. Slattery*, 54 Wis. 2d 165, 194 N.W.2d 817 (1972). *Harper* is a good discussion of the distinction between present recollection revived and past recollection recorded but its holding that the memorandum from which present recollection is revived must have been made when the facts were "fresh" in the writer's mind is a misstatement, *Krueger Serv. v. Steffen*, 30 Wis. 2d 445, 141 N.W.2d 200 (1966); *Gauthier v. State*, 28 Wis. 2d 412, 420, 137 N.W.2d 101, 106 (1965), *certiorari denied* 383 U.S. 916, 86 S. Ct. 910, 15 L. Ed.2d 671.

Sub. (6). The evolution at common law of the account book rule and the shop book rule, followed by statutory enactments that consolidated the rules in what was called a business records exception is described in Skogstad and Koppa, *Admissibility of Business Entries*, 1958 Wis. L. Rev. 245; Swietlik, *Hearsay Rule in Wisconsin—Part Three*, Wis. Cont. Legal Ed. 1, No. 2 (1962), McCormick Sections 305–306. A later history of the business records rule, s. 889.25, is found in Holz, *A Survey of Rules Governing Medical Proof in Wisconsin—1970*, 1970 Wis. L. Rev. 989, 1022–26. Three substantial changes result from substituting this exception for s. 889.25, which is repealed.

1. Substituting "regularly conducted activity" for "business" eliminates the inherent restrictions in the application of the exception if a business connotation, no matter how broadly defined, is used. Although the original shop book statute is used in s. 889.25, use of the term "business" tends to restrict the application of the statute. A police report of an accident investigation is a record of a regularly conducted activity. This alters the decision in *Wilder v. Classified Risk Ins. Co.*, 47 Wis. 2d 109, 177 N.W.2d 109, 112 (1970), that such a report is not a business record; however, as appears by item (3) *infra*, the exclusion of the report from evidence remains unchanged.

2. Opinions and diagnoses are specifically admissible. The exclusion of an out-of-court statement because it embraces an opinion is not in keeping with a modern view of the opinion rule. McCormick section 18. In addition, s. 907.01 makes clear that a lay opinion is admissible if rationally based upon the perception of the witness. Section 907.03 makes clear that the diagnoses need not be based upon admissible evidence if of a type reasonably relied upon by experts in the particular field. Note also that in *Lewandowski v. Preferred Risk Mut. Ins. Co.*, 33 Wis. 2d 69, 77, 146 N.W.2d 505, 509 (1966), a hearsay medical opinion which a medical witness relied [on] was possessed of sufficient trustworthiness to permit admission into evidence for impeachment purposes. However, this subdivision goes further than the application of the foregoing principles (see sub. (8), *infra*) and expressly permits opinions and diagnoses, but special note should be taken of the limits of admissibility upon all data including opinions and diagnoses discussed in item (3), *infra*. This change will resolve in favor of admissibility the question of whether a medical opinion in a hospital record is admissible in direct proof of the fact unless excluded because of confrontation problems. *See Gibson v. State*, 55 Wis. 2d 110, 117, 197 N.W.2d 813, 817 (1972). See note to s. 908.05.

3. This exception requires that the information be transmitted from a person with personal knowledge to the person making the entry in the course of a regularly conducted activity. Restated, it means that the entry must be based upon information transmitted to the recorder by one with (a) first-hand knowledge, and (b) a responsibility to know and report the information. Assume the situation in *Wilder*, *supra*, where the police report incorporated an eyewitness's statement. In the first instance it would be admissible to prove that the witness made the statement if the witness had testified and the truth of his testimony were at issue, but in the absence of the witness's testimony [it] would not be admissible to prove what the witness said. The problem is, of course, one of double hearsay (s. 908.05) described in *Smith v. Rural Mut. Ins. Co.*, 20 Wis. 2d 592, 601, 123 N.W.2d 496, 502 (1963), as an exclusion of statements in a report to which the maker could not testify if he were upon the witness stand. The wording of this section requires personal knowledge transmitted in the course of a "business" duty. See McCormick section 310. Thus the rules of *Smith* and *Wilder* with regard to s. 889.25 would remain unchanged and the results of both cases would remain unchanged because the information received by the officer from the witness was not transmitted by the witness in the course of a regularly conducted activity. On the other hand, the specific acknowledgement in the rule of the admissibility of opinions and diagnoses and the application of ss. 907.01 and 907.03 will expand the application of this subdivision. Because most medical opinions and diagnoses will meet the requirements of personal knowledge and transmittal pursuant to a regularly conducted activity, they will usually be admissible. The use of the phrase "regularly conducted activity" will also expand the application of the section.

Sub. (7). This exception is in accord with *Scalzo v. Marsh*, 13 Wis. 2d 126, 136, 108 N.W.2d 163, 168 (1961). Technically it is not a hearsay exception but circumstantial evidence. Nonetheless, it seems conveniently appropriate.

Sub. (8). The word "statements" includes certificates and makes possible the repeal of the first part of s. 889.18(1) although some certificates also may be admissible under other subdivisions of this section.

The principal change in Wisconsin law that this section effectuates is found in item (c). The test of admissibility that has evolved in a line of Wisconsin cases, culminating in *Wilder v. Classified Risk Ins. Corp.*, 47 Wis. 2d 109, 177 N.W.2d 109 (1970), is whether the maker of the report could testify to its contents if present in court. *See Estate of Shega*, 38 Wis. 2d 269, 275, 156 N.W.2d 392, 395 (1968); *Novakofski v. State Farm Mut. Auto Ins. Co.*, 34 Wis. 2d 154, 158, 148 N.W.2d 714, 717 (1967), 21 A.L.R.3d 411, *Huss v. Vande Hey*, 29 Wis. 2d 34, 42, 138 N.W.2d 192, 196 (1965); note to Exception (6). Opinions or conclusory facts based upon hearsay thus have been inadmissible. On its face, it seems a rational application of the multiple hearsay rule (s. 908.05). However, it tends to overlook the rule that experts may base an opinion upon facts or data, if a type reasonably relied upon by experts in the particular field, that are not otherwise admissible in evidence (s. 907.03) and the further rule (s. 907.01) that lay opinion or inference is admissible if rationally based upon the perception of the witness. Defining the boundary between the competing principles is possible only on a case-by-case basis but it must be conceded that this exception makes broader admissibility possible. A similar result but to a much lesser extent may occur with respect to item (b) and it is possible that a negligible change could occur with respect to item (a).

The addition of data compilations to the exception is consistent with the general treatment of these sections and recognizes the modern form of record-keeping. Note that the testimony of a custodian is not required to authenticate public records. *State v. Garner*, 54 Wis. 2d 100, 107, 194 N.W.2d 649, 652 (1972).

Sub. (9). This exception is consistent with s. 891.09(1).

Sub. (10). This exception is consistent with *Scalzo v. Marsh*, 13 Wis. 2d 126, 136, 108 N.W.2d 163, 173 (1961) although that case is not a direct precedent. It is also consistent with s. 889.09 which not only makes the "certificate of nonfiling" evidence but also presumptive evidence of the fact certified. No change in s. 889.09 is necessary for its applicab[ility] under this subsection and s. 909.02(10). Technically it is not a hearsay exception but circumstantial evidence. Nonetheless it seems conveniently appropriate.

Sub. (11). This exception is broader in admitting the records of religious organizations than s. 891.09(2). However, the latter section affects the weight of the evidence by making the record prima facie evidence of the facts contained in the record. To obtain the benefit of such weight

under that statute, the record must be produced by its proper custodian who under oath attests the genuineness of the document. Admissibility will be broader under this exception but it will require authentication pursuant to s. 909.01 in the same fashion as s. 891.09(2). To the extent that this subdivision is broader, the document will only be admissible but where overlapped by s. 891.09(2) the sufficiency of the evidence will be established by that subdivision. No change in s. 891.09(2) is required.

Sub. (12). The result of this exception is the same as noted with respect to sub. (11). However, under this subdivision if the certificate is executed by a public official, the certificate is self-authenticated pursuant to s. 909.02.

Sub. (13). The provision is in accord with the current common law. Section 69.22(1)(c) requires two more pieces of 5-year-old documentary evidence to establish a delayed birth registration, but correction of a marriage record makes no such specification, s. 69.50, nor is there such a requirement for a county court certificate of age, place of birth and parentage, s. 889.28.

Note that family records must be authenticated, s. 909.015(1).

Sub. (14). This provision is consistent with Wisconsin statutes, parts of which are duplicated in this provision, ss. 889.07, 889.15, 889.17, 889.18, 889.19, 891.03, 891.04, 891.05, 891.06, 891.07, 891.11, 891.12, 891.14, 891.16 and 891.36. Contents of the document as well as delivery and execution are proved by the record of the document; such a result is consistent with the provisions of recording statutes that require attesting witnesses and acknowledgement before an authorized official to entitle a document to recording. This provision should be read as supplementing other statutes which may have lesser or greater effects that address themselves to authentication or original writing rules on one hand, or the sufficiency or conclusiveness of the evidence on the other hand. *Shellow v. Hagen*, 9 Wis. 2d 506, 516, 101 N.W.2d 694, 699 (1960), applied not only the original writings rule but also Uniform Rule 63 (19) which is substantially the same exception to the hearsay rule.

Sub. (15). See comment to Exception (14). This provision is a specific illustration of the original common-law ancient document rule. See s. 908.03(16). The common-law rule is changed by elimination of the requirement that the document be ancient or the declarant unavailable, or that the dealings with the property are consistent with the statement. If there is proof of dealings inconsistent with the statement, the statement is not admissible under this rule. By eliminating the time and availability requirements, the statement in the document as well as the testimony of the declarant or other witnesses may now be received in evidence. Trustworthiness of the statement seems assured by relevance, contemporaneity with the transaction, subsequent consistent dealings and the probability that the statement will have been made before the controversy arose. Note that delivery is not evidenced by the original deed under this provision unless a statement to that effect is contained therein; however, it can be proved by the record of the deed under s. 908.03(14).

Sub (16). See comment to s. 908.03(14). The principal change in Wisconsin law is the reduction of the age requirement from 30 to 20 years. The change corresponds with s. 909.015(8). The phrase “whose authenticity is established” is simply a reminder that pursuant to s. 909.015(8) an ancient document is not authenticated solely by reason of age but requires absence of suspicion and a repository consistent with authenticity. It should be noted that appropriate proof of authenticity is required of any documentary evidence and the reference to such a requirement in this subdivision does not imply that authentication is not a requirement in other subdivisions. Wisconsin has not expressly conditioned this exception upon the unavailability of the declarant and thus the elimination of the historical requirement of unavailability may be no change in Wisconsin law. The rule is consistent in other respects with *Meuhrcke v. Behrens*, 43 Wis. 2d 1, 169 N.W.2d 86 (1969); *Jefferson v. Eiffler*, 16 Wis. 2d 123, 113 N.W.2d 834 (1962); *Barrows v. Kenosha County*, 8 Wis. 2d 58, 98 N.W.2d 461 (1959); *Dickinson v. Smith*, 134 Wis. 6, 114 N.W. 133 (1907); *Fowler v. Scott*, 64 Wis. 509, 25 N.W. 716 (1885).

Exception (17). This section is generally in accord with Wisconsin law, s. 402.724; *Nashban Barrel & C. Co. v. G.G. Parsons Trucking Co.*, 49 Wis. 2d 591, 608 n.29, 182 N.W.2d 448, 457 n. 29 (1971); *State v. Grahn*, 21 Wis. 2d 49, 53, 123 N.W.2d 510, 512 (1963). The major question posed by this provision is whether opinion polls are admissible by virtue of it. Wisconsin cases have admitted opinion poll evidence when the method of poll taking provided assurance of trustworthiness, *State v. Kramer*, 45 Wis. 2d 20, 27, 171 N.W.2d 919, 922 (1969) and have rejected it when the method of assessing opinion or fact was not trustworthy, *Rohloff v. Aid Ass’n for Lutherans*, 130 Wis. 61, 71, 109 N.W. 989, 992 (1906); *State ex rel. Leonard v. Rosenthal*, 123 Wis. 442, 447, 102 N.W. 49, 50 (1905). Opinion polls taken before or after the commencement of litigation probably require more assurances of trustworthiness than those that are “used and relied upon by the public or by persons in particular occupations” and that distinction seems to be the basis for the quoted limitation. This provision would seem to permit the use of opinion polls of the kind indicated to prove a fact; note that the state of mind exception, s. 908.03(3) may also make an opinion poll admissible. Swietlik, *Hearsay Rule in Wisconsin*, 1 Wis. Cont. Leg. Ed. 12 (No. 2, 1961).

Sub. (18). The Federal Advisory Committee comment is set forth because much of it is applicable to this form of the rule:

> The writers have generally favored the admissibility of learned treatises, McCormick section 296, p. 621; Morgan, Basic Problems of Evidence 366 (1962); 6 Wigmore section 1690, with the support of occasional decisions and rules, *City of Dothan v. Hardy*, 237 Ala. 603, 188 So. 264 (1939); *Lewandowski v. Preferred Risk Mut. Ins. Co.*, 33 Wis. 2d 69, 146 N.W.2d 505 (1966); 66 Mich. L. Rev. 183 (1967); Uniform Rule 63 (31); Kansas Code of Civil Procedure section 60-460(cc), but the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable

in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake. 6 Wigmore section 1692. Sound as this position may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. *Ross v. Gardner*, 365 F.2d 554 (6th Cir. 1966); *Sayers v. Gardner*, 380 F.2d 940 (6th Cir. 1967); *Colwell v. Gardner*, 386 F.2d 56 (6th Cir. 1967); *Glendenning v. Ribicoff*, 213 F. Supp. 301 (W.D. Mo. 1962); *Cook v. Celebrezze*, 217 F. Supp. 366 (W.D. Mo. 1963); *Sosna v. Celebrezze*, 234 F. Supp. 289 (E.D. Pa. 1964); and *see McDaniel v. Celebrezze*, 331 F.2d 426 (4th Cir. 1964). The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.

The relevance of the use of treatises on cross-examination is evident. This use of treatises has been the subject of varied views. The most restrictive position is that the witness must have stated expressly on direct his reliance upon the treatise. A slightly more liberal approach still insists upon reliance but allows it to be developed on cross-examination. Further relaxation dispenses with reliance but requires recognition as an authority by the witness, developable on cross-examination. The greatest liberality is found in decisions allowing use of the treatise on cross-examination when its status as an authority is established by any means. Annot., 60 A.L.R.2d 77. The exception is hinged upon this last position, which is that of the Supreme Court, *Reilly v. Pinkus*, 338 U.S. 269, 70 S. Ct. 110, 94 L. Ed. 63 (1949), and of recent well considered state court decisions, *City of St. Petersburg v. Ferguson*, 193 So.2d 648 (Fla. App. 1967), *cert. denied* Fla., 201 So.2d 556; *Darling v. Charleston Memorial Community Hospital*, 33 Ill.2d 326, 211 N.E.2d 253 (1965); *Dabroe v. Rhodes Co.*, 64 Wash. 2d 431, 392 P.2d 317 (1964).

In *Reilly v. Pinkus*, *supra*, the Court pointed out that testing of the professional knowledge was incomplete without exploration of the witness' knowledge of and attitude toward established treatises in the field. The process works equally well in reverse and furnishes the basis of the rule.

The rule does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness. *Dabroe v. Rhodes Co.*, *supra*. Moreover, the rule avoids the unreality of admitting evidence for the purpose of impeachment only, with an instruction to the jury not to consider it otherwise. The parallel to the treatment of prior inconsistent statements will be apparent. See ss. 906.13(2) and 908.01(4)(a).

This exception is Model Code Rule 529 adopted in *Lewandowski v. Preferred Risk Mut. Ins. Co.*, 33 Wis. 2d 69, 76, 146 N.W.2d 505, 509 (1966). Paragraphs (a) through (c) conform to s. 889.31 [50 Wis. 2d XX (1971)] although one paragraph thereof was deleted as surplusage. The statute is amended to increase notice requirements to 40 and 20 days and to simplify style. It should be noted that undue emphasis upon "learned treatises" received in evidence can be avoided by exercise of the trial court's authority to keep them from the jury room. The Model Code Rule was retained in preference to the federal rule because it is a more liberal treatment of the subject.

Subs. (19), (20) and (21). Wisconsin cases are in accord with the principle of exception (19) that evidence of reputation among family and intimates is a hearsay exception, *Estate of Dexheimer*, 197 Wis. 145, 151, 221 N.W. 737, 739 (1928); *DuPont v. Davis*, 30 Wis. 170, 178 (1872); *Eaton v. Tallmadge*, 24 Wis. 217, 222 (1869); with respect to community reputation the Wisconsin law is uncertain. The earliest case refers to "general repute" without limiting it to the family and the latest case quotes a California case which excludes community reputation in question of pedigree. The addition of community reputation to this provision should probably be considered a change in Wisconsin law because acknowledgement of the admissibility of "neighborhood notoriety" to establish a husband and wife relationship was not definitive in *McGoon v. Irvin*, 1 Pin. 526, 531, 41 Am. Dec. 409 (1845). Note the comment to s. 906.08 with respect to the changing nature of the concept of "community based" reputation. Note also the difference between "reputation" and individuals' statements, s. 908.045(5). Section 889.19 is considered in connection with exceptions (14), (15) and (16).

Exception (20). Boundary reputation evidence is admissible in Wisconsin, *Chicago Club of Lake Geneva v. Ryan*, 203 Wis. 272, 280, 234 N.W. 488, 491 (1931), although earlier cases confuse weight and sufficiency of such evidence with admissibility. *Lind v. Hustad*, 147 Wis. 56, 59, 132 N.W. 753, 755 (1911); *Nys v. Biemeret*, 44 Wis. 104, 110 (1878). No Wisconsin cases dealing with reputation as to historical events have been found.

Exception (21). This provision establishes reputation evidence as to character as a hearsay exception. Its admissibility is further governed by ss. 904.05(1) and 906.08. The provision does not deal with the question of whether an absence of bad reputation is to be equated with a good reputation as it apparently is in Wisconsin. *Spencer v. State*, 132 Wis. 509, 515, 112 N.W. 462, 465, 122 Am. St. Rep. 959, 13 Ann. Cas. 966 (1907). Wigmore section 1614. Unlike the provisions of exception (20) relating to boundary reputation, there is no requirement of *ante litem motam* in those situations where it affects trustworthiness. See Wigmore 1617–18. *Abaly v. State*, 163 Wis. 609, 613, 158 N.W. 308, 310 (1961), suggests that evidence of reputation arising after one is charged with crime ought to be excluded. For another kind of reputation evidence, see s. 944.35 (evidence of place of prostitution).

Sub. (22). The federal rule is altered to substitute "no contest" for "nolo contendere" and "state" for "government." This provision is a modification of Wisconsin law which finds civil judgment inadmissible evidence to prove facts essential to sustain the judgment. *Landauer v. Espenhain*, 95 Wis. 169, 175, 70 N.W. 287, 288 (1897); *Cameron v. Cameron*, 15 Wis. 1, 5, 82 Am. Dec. 652 (1862); note that this is a different question from the admissibility of a judgment to establish former adjudication or collateral estoppel. The alteration to the federal rule conforms the reference to a felony with the statutes cited.

Sub. (23). The provision incorporates the principle that civil judgments are evidence of some facts essential to sustain the judgment. The facts which may be so established are those provable by reputation under exceptions (19) and (20).

In Estate of Cogan, 267 Wis. 20, 26, 64 N.W.2d 454, 457 (1954), a finding in a judgment of divorce that the petitioner was not a child of the marriage dissolved by the judgment was held not conclusive of that fact in an estate proceeding, however the judgment had been received as evidence of that fact. Wisconsin law seems consistent with this provision.

Sub. (24). The most recent illustration of the application of this provision for growth of the common law is the hearsay exception fabricated in *Wirth v. State*, 55 Wis. 2d 11, 197 N.W.2d 731 (1972), in which it was held that the label on a prepacked, sealed bottle of codeine-type cough syrup, although hearsay, was support by sufficient surrounding circumstances to satisfy the ability of trustworthiness and thus admissible in evidence to establish the contents.

Similarly, *Bertrang v. State*, 50 Wis. 2d 702, 184 N.W.2d 867 (1971), illustrates a hearsay exception that fails to qualify as a present sense impression or an excited utterance. The requirements of contemporaneity and spontaneity are modified in the special situation of a child victim of a sexual assault or traumatic experience. See notes to subs. (1) and (2).

Case Annotations

(1) Present Sense Impression

State v. Ballos, 230 Wis. 2d 495, 504–05, 602 N.W.2d 117 (Ct. App. 1999).
In a prosecution for arson, transcripts of 911 tape recordings from unidentified callers describing a license plate number of a car at the scene of the fire were properly admitted as present sense impressions, since the callers were describing events that they were perceiving or had just observed.

Hamed v. County of Milwaukee, 108 Wis. 2d 257, 273 n.3, 321 N.W.2d 199 (1982).
A passenger's statement to his seatmate on a bus that the bus driver was watching the seatmate as he fired a jelly bean with a slingshot was admissible as a present sense impression.

La Barge v. State, 74 Wis. 2d 327, 340, 246 N.W.2d 794 (1976).
The time element necessary for an observation to be a present sense impression is more narrowly measured than for an excited utterance.

(2) Excited Utterance

State v. Mayo, 2007 WI 78, ¶¶ 53–55, 301 Wis. 2d 642, 734 N.W.2d 115.
In this criminal prosecution for armed robbery, the trial court properly admitted the testimony of the victim and responding officer describing that the victim told the officer he had just been beaten and robbed. The victim testified that the events had occurred just minutes earlier, the events were startling in nature, and, according to the officer, the victim was visibly upset and bleeding.

State v. Searcy, 2006 WI App 8, ¶¶ 46–48, 288 Wis. 2d 804, 709 N.W.2d 497.
A statement by the defendant's cousin inculpating him in a burglary prosecution by advising arresting officers that the defendant stayed with her "from time to time" was admissible as an excited utterance because the statement was made immediately after the defendant's gunpoint arrest that she had just witnessed and because the witness did not have the opportunity or capacity to review the situation and calculate the likely impact of her statements.

State v. Ballos, 230 Wis. 2d 495, 506, 602 N.W.2d 117 (Ct. App. 1999).
In a prosecution for arson, transcripts of 911 tape recordings from unidentified callers reporting the fire and describing a license plate number of a car at the scene of the fire may properly be admitted as excited utterances, because a building on fire is a startling event and, absent contrary evidence such as a delay in the call, it may be assumed that the statements were made under the stress of the event.

State v. Huntington, 216 Wis. 2d 671, 682–84, 575 N.W.2d 268 (1998).

An excited utterance exception has three requirements: (1) there must be a startling event or condition; (2) the declarant's out-of-court statement must relate to the startling event or condition; and (3) the statement must have been made while the declarant was under the stress of excitement caused by the event or condition.

The factors established in *State v. Gerald L.C.*, 194 Wis. 2d 548, 535 N.W.2d 777 (Ct. App. 1995), for applying the excited utterance exception to allegations of sexual abuse by children, do not establish a bright-line admissibility test. Even when a child abuse victim's statements do not fall within the factors from *Gerald L.C.*, the statements could still demonstrate sufficient trustworthiness to be admitted under the excited utterance exception.

State v. Gerald L.C., 194 Wis. 2d 548, 557, 535 N.W.2d 777 (Ct. App. 1995).

Three factors, while not dispositive of admissibility, are common to child sexual-assault cases in which hearsay has been admitted under the excited utterance exception. These factors are that (1) the child was under the age of 10, (2) the time between the incident and the child's report was less than a week, and (3) the child first reported the incident to the child's mother. Even if these factors do not appear in a case, the statement may still be admissible if the declarant was still under the stress of excitement caused by the event at the time the declarant made the statement.

State v. Moats, 156 Wis. 2d 74, 97–98, 457 N.W.2d 299 (1990).

Although the time between a triggering event and an utterance is the key factor in this hearsay exception, time is measured by the duration of the condition of excitement rather than by its mere elapse. Additionally, a liberal interpretation governs the excited utterance exception as applied to young children. Thus, when a five-year-old child made statements to her mother regarding a sexual assault allegedly committed by the defendant approximately 10 days earlier, the trial court did not erroneously exercise its discretion in admitting the hearsay testimony.

State v. Dwyer, 143 Wis. 2d 448, 459–60, 466, 422 N.W.2d 121 (Ct. App. 1988), *aff'd*, 149 Wis. 2d 850, 440 N.W.2d 344 (1989).

A three-year-old child's statements about sexual abuse were admissible as excited utterances even though made in response to questioning.

In contrast, the defendant's statements to his mother regarding the circumstances of his confession were not admissible as excited utterances. The statements lacked spontaneity and the defendant had sufficient time to think about what he would tell his mother. Moreover, because the defendant was an adult, the broad liberal interpretation of what constitutes an excited utterance was not applicable.

State v. Gollon, 115 Wis. 2d 592, 598–600, 340 N.W.2d 912 (Ct. App. 1983).

The excited utterance exception is liberally applied to statements by a young child involved in a claimed sexual assault.

State v. Padilla, 110 Wis. 2d 414, 419–21, 329 N.W.2d 263 (Ct. App. 1982).

A broad interpretation is given to what constitutes an excited utterance when applied to young children. This rule does not mandate that the statement be contemporaneous. Instead it asks whether the statement is spontaneous, defined as having proceeded from "natural feeling … without external constraint." A three-day delay in telling of the event was not too long, because it was apparent that the child was still suffering from the stress of the incident at that time.

Christensen v. Economy Fire & Cas. Co., 77 Wis. 2d 50, 56–59, 252 N.W.2d 81 (1977).

The excited utterance exception is based on spontaneity and stress. In determining whether a statement is an excited utterance the important factors for the trial judge's consideration are timing and stress. The time factor is measured by the duration of the condition of excitement, rather than the mere lapse of time from the event described. This is a potentially longer time than with a "present sense impression" under Wis. Stat. § 908.03(1).

The fact that an out-of-court utterance is self-serving is not, alone, sufficient to exclude it. If such an utterance falls within one of the exceptions to the hearsay rule, the judgment underlying that exception, i.e., that the assurance of trustworthiness of such utterances outweighs the danger inherent in hearsay, should control and the declaration be admitted despite its self-serving nature.

State v. Lenarchick, 74 Wis. 2d 425, 449, 247 N.W.2d 80 (1976).

Independent evidence that the declarant in fact observed the event that the declarant is describing is not required. The inference that the declarant saw the event is permitted from the utterance itself and from the circumstances under which it was made. The rationale of the excited utterance exception is that the utterance stems from a nonrational, and thus objectively truthful, process of the person at the event. Accordingly, it belies the rationale of the exception to conclude that the declarant made the excited utterance on the basis of an event of which the declarant had no knowledge.

State v. Davis, 66 Wis. 2d 636, 650–51, 225 N.W.2d 505 (1975).

A statement is admissible under the excited utterance exception to the hearsay rule if it is based on personal knowledge and observation, but the declarant may use senses other than sight to gain the requisite personal knowledge by observation. Here, the witness's knowledge was gained from hearing an altercation.

Phifer v. State, 64 Wis. 2d 24, 34–35, 218 N.W.2d 354 (1974).

The psychological basis for this exception is that people instinctively tell the truth, but when they have time to stop and think they may lie. The fact that the utterance comes in response to a question does not bar its admissibility. However, the fact that it is made in response to an inquiry is an indication that the statement was a result of reflective thought, and when the time interval permitted such thought, these factors might swing the balance in favor of exclusion.

See also ....

State v. Martinez, 150 Wis. 2d 62, 72, 440 N.W.2d 783 (1989) (statements of participants in fight may be admissible as excited utterances)

Muller v. State, 94 Wis. 2d 450, 467, 289 N.W.2d 570 (1980) (touchstone of excited utterance is whether declarant under shock or stress of event at time of utterance)

La Barge v. State, 74 Wis. 2d 327, 341, 246 N.W.2d 794 (1976) (excited utterances based on lack of time for declarant to reflect or conjure)

State ex rel. Harris v. Schmidt, 69 Wis. 2d 668, 684, 230 N.W.2d 890 (1975) (liberal interpretation given to utterances of young children, particularly alleged sexual-assault victims)

(3) Then Existing Mental, Emotional, or Physical Condition

Henke v. Estate of Klawitter (In re Est. of Klawitter), 2023 WI App 60, ¶¶ 40–41, 55–58, 409 Wis. 2d 696, 998 N.W.2d 579.

The exclusion of statements "of memory or belief" from the hearsay exception under Wis. Stat. § 908.03(3) appears to be limited to wills and does not apply to nonprobate transfers, such as assets transferred via joint ownership with survivorship rights or beneficiary designations. Therefore, in an estate dispute over transfers via an alleged "account of convenience," titled in the names of the decedent and one daughter, the circuit court properly admitted a statement by the decedent about the nature of the account.

Czaplewski v. Shepherd (In re Est. of Shepherd), 2012 WI App 116, ¶ 23, 344 Wis. 2d 440, 823 N.W.2d 523.

This exception allows evidence describing the declarant's then existing state of mind. It can be used to describe the declarant's intent. This exception is thought of to "look forward in time" and, thus, can be used to prove that the declarant later acted in conformity with a certain mental state. Thus, in this will contest case, in which the issue in controversy was the testator's intent, the trial court properly admitted the drafting attorney's testimony as permissible extrinsic evidence.

State v. Prineas, 2012 WI App 2, ¶¶ 16–20, 338 Wis. 2d 362, 809 N.W.2d 68.

In a sexual-assault prosecution, in which the victim's alleged lack of consent was an issue, the victim's purported remarks reflecting acquiescence met the exception for statements of present state of mind, emotion, or belief.

State v. Kutz, 2003 WI App 205, ¶¶ 55–62, 267 Wis. 2d 531, 671 N.W.2d 660.

In a prosecution for first-degree intentional homicide, hiding a corpse, stalking, and obstructing an officer, the trial court erroneously admitted the victim's statements to others of threats that the defendant made. The court had admitted these statements under the state-of-mind exception, which allows the admission of a declarant's statement of the declarant's feelings to prove how the declarant felt at the time. But because Wis. Stat. § 908.03(3) does not allow admission of a declarant's statement of the cause of those feelings to prove that certain events occurred, the victim's statements were erroneously admitted.

State v. Santana-Lopez, 2000 WI App 122, ¶ 6 n.4, 237 Wis. 2d 332, 613 N.W.2d 918.

A defendant's offer to undergo DNA testing may be admissible under this section to show a consciousness of innocence.

State v. Jackson, 187 Wis. 2d 431, 436, 523 N.W.2d 126 (Ct. App. 1994).

In a trial for first-degree reckless homicide arising from an incident in which the defendant allegedly pursued the victim in a high-speed car chase until the victim's car crashed, testimony from the victim's coworker, that just before the chase the victim called the witness to explain her fear of the defendant, was admissible under the state-of-mind exception to the hearsay rule.

(4) Statements for Purposes of Medical Diagnosis or Treatment

State v. Domke, 2011 WI 95, ¶¶ 21–46, 337 Wis. 2d 268, 805 N.W.2d 364.

Statements by a child made to counselors and social workers in the course of counseling for sexual abuse do not fall within the medical diagnosis and treatment exception to hearsay.

State v. Huntington, 216 Wis. 2d 671, 692–96, 575 N.W.2d 268 (1998).

The medical diagnosis exception may be invoked to cover third parties making statements in the course of seeking diagnosis and medical treatment for another if there are sufficient independent indicia of reliability. For example, statements made by a parent seeking medical treatment on behalf of a child could be admitted under this exception.

Additionally, the scope of Wis. Stat. § 908.03(4) is not confined to medical doctors, psychologists, psychiatrists, and chiropractors. It may also extend to nurse practitioners on staff with a physician. This exception does not apply to counselors or social workers, however, because the information that those professionals are obligated to obtain about a patient extends beyond that associated with medical diagnosis and treatment.

State v. Sorenson, 143 Wis. 2d 226, 251, 421 N.W.2d 77 (1988).

A child's statements to a physician, identifying the defendant as having sexually assaulted her, were admissible under this exception as statements made for the purpose of medical diagnosis or treatment. Even a child as young as three or four years of age understands that statements made to a physician or psychologist will be used to ease the child's physical, emotional, or psychological pain. Since the statements were pertinent to a diagnosis consistent with the child's physical and emotional condition, they were admissible.

Drexler v. All Am. Life & Cas. Co., 72 Wis. 2d 420, 431–32, 241 N.W.2d 401 (1976).

"This court has held that medical opinions based upon subjective statements of the patient are inadmissible unless those statements were made for the purpose of procuring treatment and not solely for the purpose of having the physician testify. This rule, of course, is a recognition of the self-serving nature of the patient's statements; the exception being based upon the presumption that a truthful account of injuries will be given when treatment is actually sought."

Authors' Note. This statement seemingly limits the scope of this subsection of the rules, and implies at least that *Ritter v. Coca-Cola Co.*, 24 Wis. 2d 157, 128 N.W.2d 439 (1964), is still good law despite the comment in the Judicial Council Committee Note.

See also ....

State v. Nelson, 138 Wis. 2d 418, 431–33, 406 N.W.2d 385 (1987) (statements made to non-physician psychologist, with patient's understanding that statements were made for purpose of diagnosis or treatment, may be admissible even if patient is young child)

State v. Wyss, 124 Wis. 2d 681, 707–11, 370 N.W.2d 745 (1985) (statements to psychiatrist by decedent about relationship with husband admissible under Wis. Stat. § 908.03(4), *overruled on other grounds by State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990)

Authors' Note. The court's extensive discussion of the confrontation issue has been superseded by the *Crawford* line of cases. See the "*Crawford* and the Right to Confrontation" discussion in appendix A, *infra*.

Klingman v. Kruschke, 115 Wis. 2d 124, 126, 339 N.W.2d 603 (Ct. App. 1983) (statement made to chiropractor, consulted only for purpose of testimony, admissible if used to form the chiropractor's opinions)

(5) Recorded Recollection

State v. Keith, 216 Wis. 2d 61, 74–75, 573 N.W.2d 888 (Ct. App. 1997).

A document reviewed by a witness is independently admissible as a past recollection recorded only if it fails to refresh the witness's recollection. Otherwise, only the witness's refreshed testimony is admissible, not the document.

State v. Jenkins, 168 Wis. 2d 175, 189, 483 N.W.2d 262 (Ct. App. 1992).

If the contents of a memorandum or record accurately reflect what a witness once knew but no longer remembers, the memorandum or record need not have been prepared by that witness in order to be admissible. However, the recorded recollection must exist in some physical form.

State v. Kreuser, 91 Wis. 2d 242, 251, 280 N.W.2d 270 (1979).

In order for recorded recollection to be admissible, it must be shown to accurately reflect the knowledge of the eyewitness at the time it was made.

State ex rel. Huser v. Rasmussen, 84 Wis. 2d 600, 609–10, 267 N.W.2d 285 (1978).

Reports that qualify under this exception may be read, but oral testimony about their contents must be excluded.

State v. Wind, 60 Wis. 2d 267, 274–75, 208 N.W.2d 357 (1973).

If a witness can look at a writing that refreshes the witness's memory as to the facts and the witness can then testify from the witness's independent recollection, the testimony and not the writing is admitted in evidence as present recollection refreshed. On the other hand,

if a witness looks at a writing and does not refresh the witness's memory to the extent that the witness can form an independent recollection yet can testify that the witness knew the facts to be accurate when the witness recorded them and the recording took place when the facts were fresh in the witness's mind, then the document itself is admitted into evidence under the doctrine of past recollection recorded.

(6) Records of Regularly Conducted Activity

Authors' Note. See also Wis. Stat. § 346.73, which prohibits use of written accident reports required to be filed with or transmitted to the Department of Transportation (DOT) or a county or municipal authority as evidence in any civil or criminal trial arising out of an accident.

Gemini Cap. Grp., LLC v. Jones, 2017 WI App 77, ¶¶ 22–24, 378 Wis. 2d 614, 904 N.W.2d 131.

An affidavit submitted in support of a motion for summary judgment must be made by someone with personal knowledge of every averment in that affidavit. At a minimum, the personal knowledge must be reasonably implied from the facts stated in the affidavit.

Deutsche Bank Nat'l Tr. Co. v. Olson, 2016 WI App 14, ¶¶ 37, 45–46, 366 Wis. 2d 720, 875 N.W.2d 649.

A record created by a third party and integrated into another entity's records is admissible under the business records exception to the hearsay rule so long as the other elements of the business records exception are met and the custodian entity has relied on the accuracy of the record. In this case, admission was supported because the witness had personal knowledge regarding the creation of the custodian's records and the quality-control checks completed at the time of the integration.

Bank of Am. NA v. Neis, 2013 WI App 89, ¶ 34, 349 Wis. 2d 461, 835 N.W.2d 527.

A custodian or other qualified witness, when testifying to the requirements of Wis. Stat. § 908.03(6), need not describe the particular procedures followed in creating the document or the precise location in which the document was created to make the required showing.

Palisades Collection, LLC v. Kalal, 2010 WI App 38, ¶ 22, 324 Wis. 2d 180, 781 N.W.2d 503.

A custodian or other qualified witness does not need to be the author of the records or have personal knowledge of the events recorded to be qualified to testify to the requirements of Wis. Stat. § 908.03(6). However, the witness must have personal knowledge of how the records were made so that the witness is qualified to testify that they were made "at or near" the time of the recorded event, by or from information transmitted by a person with knowledge, and in the course of a regularly conducted activity.

State v. Doss, 2008 WI 93, ¶¶ 36–56, 312 Wis. 2d 570, 754 N.W.2d 150.

Foundational certifications in the form of affidavits from bank record custodians authenticating "nontestimonial" records for the purpose of litigation fall under the business record exception of *Crawford v. Washington*, 541 U.S. 36 (2004), and do not violate constitutional confrontation rights.

State v. Williams, 2002 WI 58, ¶¶ 34–49, 253 Wis. 2d 99, 644 N.W.2d 919, *amended on reconsideration*, 2002 WI 118, 256 Wis. 2d 56, 652 N.W.2d 391.

State crime lab reports that incriminate a criminal defendant are not admissible under Wis. Stat. § 908.03(6). Although business records generally may bear adequate indicia of reliability, crime lab reports are prepared in anticipation of litigation and are requested by the state, so the reliability of such reports is compromised.

State v. Ballos, 230 Wis. 2d 495, 508–10, 602 N.W.2d 117 (Ct. App. 1999).

In a prosecution for arson, transcripts of 911 tape recordings from unidentified callers reporting the fire and describing a license plate number of a car at the scene of the fire were admissible, when the transcripts indicated sufficient indicia of trustworthiness.

Pophal v. Siverhus, 168 Wis. 2d 533, 547, 484 N.W.2d 555 (Ct. App. 1992).

While opinions and diagnoses in medical records are admissible under this exception, a medical record containing an opinion or diagnosis may be excluded in the trial judge's discretion if the entry requires explanation or a detailed statement of the judgmental factors on which the diagnosis or opinion is based.

Berg-Zimmer & Assocs., Inc. v. Central Mfg. Corp., 148 Wis. 2d 341, 350–51, 434 N.W.2d 834 (Ct. App. 1988).

A production manager was not an "other qualified witness" under this exception, because he was not in a position to testify about the origin of the entries or their correctness. To be qualified under this exception, a witness must possess knowledge concerning the contemporaneousness of the entries, the person(s) who transmitted them, and whether they were made in the course of a regularly conducted activity. The fact that a person had possession of the records and understood their contents cannot bootstrap the person into a position of a qualified witness.

Johnson v. Misericordia Cmty. Hosp., 97 Wis. 2d 521, 547–48, 294 N.W.2d 501 (Ct. App. 1980), *aff'd*, 99 Wis. 2d 708, 301 N.W.2d 156 (1981).

Hospital records regarding executive committee decisions were properly considered by a jury as evidence of the type of information available to a hospital at the time of a doctor's application for staff privileges. A defendant who objected to the admission of the records should have challenged the trustworthiness of the physicians involved or tried to prove the untruthfulness of the reports.

Boyer v. State, 91 Wis. 2d 647, 661–63, 284 N.W.2d 30 (1979).

Whether a report is admissible under this exception depends on whether there are additional levels of hearsay within the report. If there are, all levels of hearsay must qualify under an objection to the hearsay rule.

Strelecki v. Firemans Ins. Co., 88 Wis. 2d 464, 476–78, 276 N.W.2d 794 (1979).

A doctor may testify from medical records that the doctor did not personally prepare and may give opinions based on those records. Such testimony may be elicited either on direct or by way of impeachment on cross-examination.

Kuhlman, Inc. v. G. Heileman Brewing Co., 83 Wis. 2d 749, 760, 762–63, 266 N.W.2d 382 (1978).

Opinions included in business records regularly kept are admissible. However, not everything recorded in the course of regular business activity is admissible. Even if all requirements of this exception are met, records may be excluded if surrounding circumstances indicate a lack of trustworthiness.

Items to be considered regarding trustworthiness include motive to be inaccurate; factors assuring reliability, such as systematic checking of and regularity in maintaining records, which produce habits of precision; and the business's actual reliance on such figures.

The trial court may use other techniques to ensure truthfulness if it decides to admit business records. The declarant may be required to testify, if available; other evidence attacking the declarant's credibility may be received; and the availability of other evidence may be considered.

State v. Olson, 75 Wis. 2d 575, 587 n.6, 250 N.W.2d 12 (1977).

There is no requirement that the maker of records of regularly conducted activity be unavailable. The records are deemed to have sufficient guarantees of trustworthiness to eliminate the need for showing the declarant's unavailability.

Rollie Johnson Plumbing & Heating Serv., Inc. v. DOT, 70 Wis. 2d 787, 793, 235 N.W.2d 528 (1975).

Even opinions in the form of an appraisal may be admitted as an exception to the hearsay rule if done in the course of regularly conducted activity. However, admission is subject to trial court discretion if the circumstances show lack of trustworthiness.

See also ....

Cobb State Bank v. Nelson, 141 Wis. 2d 1, 8, 413 N.W.2d 644 (Ct. App. 1987) (business records can be admissible even if undisclosed internal records)

Town of Fifield v. State Farm Mut. Auto Ins. Co., 120 Wis. 2d 227, 229, 353 N.W.2d 788 (1984) (summaries of invoices prepared by town clerk admissible)

City of Milwaukee v. Allied Smelting Corp., 117 Wis. 2d 377, 391–92, 344 N.W.2d 523 (Ct. App. 1983) (core issue is trustworthiness, and court must exercise sound discretion in ruling)

Johnson v. American Fam. Mut. Ins. Co., 93 Wis. 2d 633, 649, 287 N.W.2d 729 (1980) (judge's comments in ruling on postverdict motions in prior trial not within exception as regularly conducted activity)

City of Superior v. DILHR, 84 Wis. 2d 663, 673, 267 N.W.2d 637 (1978) (physician's medical report, even if not a hospital record, may be admissible)

(6m) Patient Health Care Records

Authors' Note. This section does not apply to worker's compensation proceedings. *See* Wis. Stat. § 102.17(1)(d).

Gaethke v. Pozder, 2017 WI App 38, ¶¶ 22–32, 376 Wis. 2d 448, 899 N.W.2d 381.

Medical bills not properly authenticated pursuant to Wis. Stat. § 908.03(6m)(b) might still be admissible pursuant to the residual hearsay exception, Wis. Stat. § 908.03(24), if the medical bills are authenticated pursuant to Wis. Stat. § 909.01.

Medical bills admitted in this manner still may be entitled to the presumptions of reasonableness and necessity of Wis. Stat. § 908.03(6m)(bm). A party need not have a qualified expert prove the reasonableness of a medical expense reflected in a bill.

State v. Rundle, 166 Wis. 2d 715, 728–29, 480 N.W.2d 518 (Ct. App. 1992).

Medical records may be introduced without making the record writers available for cross-examination only if the evidence is clinical and nondiagnostic. "Clinical and nondiagnostic evidence" is defined as the objective findings of medical personnel (e.g., temperature readings and x-ray and lab test results).

Clinical and nondiagnostic evidence also includes statements of the patient describing the injury's source and evaluating the injury. The patient's motivation for proper treatment ensures the trustworthiness of information provided to medical staff. Clinical and nondiagnostic evidence does not include the medical staff's impressions, opinions, conclusions, and diagnoses.

Hagenkord v. State, 100 Wis. 2d 452, 460, 302 N.W.2d 421 (1981).

Hospital records are not excluded as hearsay even though the doctor or other declarant who furnishes medical or hospital services is available and does not testify about the declarant's entries. The records are specifically exempt from the hearsay rule by this exception so long as the statutory conditions precedent are followed. Such records are self-authenticating under Wis. Stat. § 909.02(11).

(7) Absence of Entry in Records of Regularly Conducted Activity

(8) Public Records and Reports

State v. Loayza, 2021 WI 11, ¶¶ 31, 41–44, 395 Wis. 2d 521, 954 N.W.2d 358.

A DOT driving record submitted under Wis. Stat. § 908.03(8) was competent proof of a prior conviction. But the information in such a record is subject to challenge from the defense, and the burden of proof remains on the state to prove prior convictions by a preponderance of the evidence.

S.C. Johnson & Son, Inc. v. Morris, 2010 WI App 6, ¶¶ 41–42, 322 Wis. 2d 766, 779 N.W.2d 19.

Absent evidence to indicate lack of trustworthiness, a public agency's reports (affidavits of federal government law enforcement agents), containing matters observed pursuant to a duty imposed on that agency by law, are admissible.

Staskal v. Symons Corp., 2005 WI App 216, ¶¶ 16–19, 287 Wis. 2d 511, 706 N.W.2d 311.

In this products-liability action, the trial court properly exercised its discretion when it excluded an Occupational Safety and Health Administration (OSHA) report, concerning the manner of the subject product's failure, because the report was not trustworthy. Under an applicable federal law, the OSHA investigator could not be called as a witness by the litigants. Thus, the plaintiffs could not cross-examine the investigator about the conclusions in the report that were adverse to the plaintiffs' theory of liability. This undermined the trustworthiness of the report.

Among the factors relevant to trustworthiness is whether the person preparing the public record held any kind of hearing when the report was prepared. In this case, the OSHA investigator did not hold a hearing.

In addition, even though this section contemplates the unavailability of the declarant, the inability to call the investigator as a witness is a proper factor to consider when determining trustworthiness, particularly with respect to OSHA reports.

State v. Van Riper, 2003 WI App 237, ¶ 17 & n.5, 267 Wis. 2d 759, 672 N.W.2d 156.

A defendant's driving record, which the DOT is statutorily required to maintain for each motor vehicle licensee, is a public record admissible under the public records and reports exception to the hearsay rule.

State v. Gordon, 2002 WI App 53, ¶¶ 41–43, 250 Wis. 2d 702, 641 N.W.2d 183, *rev'd on other grounds*, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765.

An order for injunction, a temporary restraining order, and a proof of service form were not properly admitted into evidence under Wis. Stat. § 908.03(8) to prove the element of knowledge of an existing injunction in a prosecution for knowingly violating a domestic injunction, because the hearsay documents were not properly authenticated.

> ***Authors' Note.*** Hearsay and authentication are separate issues, although, as this case demonstrates, they may arise together. *See also* Wis. Stat. ch. 909.

Sullivan v. Waukesha Cnty., 218 Wis. 2d 458, 468–72, 578 N.W.2d 596 (1998).

A pamphlet titled "Basic Training Program for Breath Examiner Specialist," published by the Wisconsin DOT and the Wisconsin State Patrol, contains factual conclusions made pursuant to the department's duty to administer and enforce the laws relating to the licensing of drivers and is therefore admissible under Wis. Stat. § 908.03(8).

State v. Keith, 216 Wis. 2d 61, 77, 573 N.W.2d 888 (Ct. App. 1997).

Probation and parole files compiled by the Department of Corrections fall within the definition of *public records*.

Lievrouw v. Roth, 157 Wis. 2d 332, 355, 459 N.W.2d 850 (Ct. App. 1990).

Relevant pages from *The Wisconsin Motorist Handbook*, which concerned alcohol and its effect on a person's driving ability, were admissible under this exception.

Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 161–67 (1988).

Portions of investigatory reports otherwise admissible under former Fed. R. Evid. 803(8)(C) (since renumbered as Fed. R. Evid. 803(8)(A)(iii)) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the rule's trustworthiness requirement, it should be admissible along with other portions of the reports.

Authors' Note. A U.S. Supreme Court decision interpreting a federal rule of evidence is *only* persuasive, not binding, in connection with the interpretation of that rule's Wisconsin counterpart, unless the decision is based on the U.S. Constitution. *See State v. Blalock*, 150 Wis. 2d 688, 702, 442 N.W.2d 514 (Ct. App. 1989).

State v. Leis, 134 Wis. 2d 441, 445, 397 N.W.2d 498 (Ct. App. 1986).

A defendant's driving record is a public record admissible under this exception.

State v. Hinz, 121 Wis. 2d 282, 288, 360 N.W.2d 56 (Ct. App. 1984).

A blood alcohol chart is a compilation of a public agency. Its contents represent factual findings made within the authority of that agency; as such, it is admissible under this exception.

Boyer v. State, 91 Wis. 2d 647, 661, 284 N.W.2d 30 (1979).

Police reports are admissible under this exception. However, if there are portions that are inadmissible for other reasons, e.g., hearsay within them, those portions must be excluded.

State ex rel. Prellwitz v. Schmidt, 73 Wis. 2d 35, 39–40, 242 N.W.2d 227 (1976).

Department of Health and Social Services (now Department of Corrections) records were admissible at a probation revocation hearing because they came within the statutory definition of public records. (The Department of Health and Social Services no longer exists; functions related to probation now are exercised by the Department of Corrections.)

See also ....

Johnson v. American Fam. Mut. Ins. Co., 93 Wis. 2d 633, 649, 287 N.W.2d 729 (1980) (judge's decision in prior trial admissible as decision only, not as substantive evidence of damages)

(9) Records of Vital Statistics

(10) Absence of Public Record or Entry

Nelson v. Zeimetz, 150 Wis. 2d 785, 799–800, 442 N.W.2d 530 (Ct. App. 1989).

For evidence to be admissible under this exception, there must be a certificate under seal or direct testimony regarding a diligent search. Absent one or the other, a letter from the DOT was not admissible in this case.

(11) Records of Religious Organizations

(12) Marriage, Baptismal, and Similar Certificates

(13) Family Records

(14) Records of Documents Affecting an Interest in Property

(15) Statements in Documents Affecting an Interest in Property

(16) Statements in Ancient Documents

Wosinski v. Advance Cast Stone Co., 2017 WI App 51, ¶¶ 63–68, 377 Wis. 2d 596, 901 N.W.2d 797.

"As-Built Drawings" were properly admitted under the ancient documents rule. The drawings were more than 20 years old and were what they were purported to be—architectural drawings depicting the construction project at issue in this case. Arguments related to who had

submitted the drawings were a weight and credibility issue for the jury and not an issue of admissibility.

Horak v. Building Servs. Indus. Sales Co., 2012 WI App 54, ¶¶ 8–16, 341 Wis. 2d 403, 815 N.W.2d 400.

Invoices showing that a defendant-supplier sold asbestos products to a business while that business's now deceased employee worked there were admissible under Wis. Stat. § 908.03(16). The documents were more than 20 years old, and their authenticity was adequately established under Wis. Stat. § 909.015(8) despite no proof of chain of custody or witness verification of authenticity. The location of the invoices before production (in the defendant's attorney's office because of prior use in litigation) and their condition created no suspicion that they were inauthentic.

(17) Market Reports, Commercial Publications

Authors' Note. *See also* Wis. Stat. § 402.724 (admits market reports published in official publications, trade journals, newspapers, or general circulation periodicals when prevailing price of goods regularly bought and sold in any established commodity market is in issue).

(18) Learned Treatises

Ansani v. Cascade Mountain, Inc., 223 Wis. 2d 39, 50, 588 N.W.2d 321 (Ct. App. 1998).

Wis. Stat. § 908.03(18) allows the use of learned treatises in cross-examination if a proper foundation is established, even though a 40-day notice has not been provided. The party seeking to impeach a witness with a learned treatise must establish the authority of the author of the treatise, not just the authority of the treatise generally.

Broadhead v. State Farm Mut. Auto. Ins. Co., 217 Wis. 2d 231, 245–48, 579 N.W.2d 761 (Ct. App. 1998).

Before an excerpt from a treatise, periodical, or pamphlet may be admitted as substantive evidence, an expert in the field must testify that the writer of the statement is recognized in the writer's profession or calling as an expert in the subject. It is error to admit such an excerpt based only on an expert's testimony that the publication itself is reliable and authoritative, without mention of the writer's expertise.

T.A.T. v. R.E.B. (In re Paternity of M.J.B.), 144 Wis. 2d 638, 654, 425 N.W.2d 404 (1988).

If an expert witness is not called to explain the probabilities of paternity evidence, then a treatise may be introduced under this exception.

Authors' Note. A foundation meeting the requirements of this subsection must still be laid.

(19) Reputation Concerning Personal or Family History

(20) Reputation Concerning Boundaries or General History

(21) Reputation as to Character

(22) Judgment of Previous Conviction

(23) Judgment as to Personal, Family or General History, or Boundaries

(24) Other Exceptions

Culver v. Kaza, 2021 WI App 57, ¶¶ 19–22, 399 Wis. 2d 131, 963 N.W.2d 865.

An affidavit provided by a process server had sufficient guarantees of trustworthiness to be admissible under Wis. Stat. § 908.03(24) when the process server provided clear information about the "what," "how," "why," and "who" of the completed service. The statute regarding service of process is based on a presumption of reliability that clothes such affidavits in "circumstantial guarantees of trustworthiness" comparable to other hearsay exceptions.

State v. Mercado, 2021 WI 2, ¶¶ 56–63, 67, 395 Wis. 2d 296, 953 N.W.2d 337.

The court applied the five-factor test of *State v. Sorenson*, 143 Wis. 2d 226, 245-46, 421 N.W.2d 77 (1988), to conclude that a child's videorecorded statement had circumstantial guarantees of trustworthiness such that it was admissible under the residual hearsay exception. No single factor is dispositive. Instead, the court must make its decision based on the comparative weight it gives to all the *Sorenson* factors.

Gaethke v. Pozder, 2017 WI App 38, ¶¶ 28–30, 376 Wis. 2d 448, 899 N.W.2d 381.

Medical bills will satisfy the criteria for circumstantial guarantees of trustworthiness and should be admitted when they identify the health-care provider, the identity of the patient, the date of treatment, and a description of care.

State v. Huntington, 216 Wis. 2d 671, 686–91, 575 N.W.2d 268 (1998).

An 11-year-old alleged victim's allegations of sexual abuse, made to her mother, her sister, and a police officer, were admissible in a prosecution for sexual assault of a child under age 13, because the facts and circumstances surrounding the making of the statements demonstrated sufficient indicia of reliability, including the following: the alleged victim had a close relationship with the defendant; the alleged victim, her mother, her sister, and the police officer all lacked a motive to fabricate; and the defendant corroborated virtually everything in the victim's statements except the allegations of sexual abuse.

State v. Stevens, 171 Wis. 2d 106, 120, 490 N.W.2d 753 (Ct. App. 1992).

The key to determining admissibility under this exception is the "circumstances surrounding the making of the hearsay statement." Residual hearsay exceptions require the proponent to establish circumstantial guarantees of trustworthiness comparable to those existing for enumerated exceptions. This is not a "catch-all" or "near miss" category that permits the admission of otherwise unacceptable hearsay. This exception is for the novel or unanticipated category of evidence that is as reliable as the named categories and should be used rarely.

State v. Jenkins, 168 Wis. 2d 175, 193, 197, 483 N.W.2d 262 (Ct. App. 1992).

The testimony of a former assistant district attorney about a statement made to him during an interview with a three-year-old boy who witnessed his mother's murder had circumstantial guarantees of trustworthiness comparable to police officers' notes of the interview four days after the murder and was, therefore, admissible under this exception.

The court equated this case with Wisconsin cases that recognize the use of the residual exception for receiving out-of-court statements by young sexual-assault victims who are incapable of expressing themselves in court when the child and the perpetrator are the sole witnesses to the crime.

State v. Peters, 166 Wis. 2d 168, 178, 479 N.W.2d 198 (Ct. App. 1991).

A court will only reluctantly use the residual hearsay exception to permit the admission of statements specifically found inadmissible under another section of Wis. Stat. ch. 908.

A child's confidential statements to classmates concerning alleged sexual assaults when she was younger did not have sufficient guarantees of trustworthiness to be admissible under this exception.

City of Menomonie v. Evensen Dodge, Inc., 163 Wis. 2d 226, 236–37, 471 N.W.2d 513 (Ct. App. 1991).

In an action for negligence and breach of fiduciary duty in the administration of a trust fund, documentary evidence of the profit the defendant made on the use of the plaintiff's uninvested trust funds was admissible to show the plaintiff's damages because the evidence possessed sufficient indicia of trustworthiness (the defendant customarily relied on the accuracy of similar reports; the document was marked for internal use and did not appear to have been prepared in anticipation of litigation; and the document was disclosed during discovery in a manner that made it less likely that the document was wrongfully prepared).

State v. Oliver, 161 Wis. 2d 140, 143, 467 N.W.2d 211 (Ct. App. 1991).

Statements made by a young child to a parent concerning alleged physical abuse are admissible hearsay statements under either this exception or Wis. Stat. § 908.045(6), pursuant to the five factors established in *State v. Sorenson*, 143 Wis. 2d 226, 245–46, 421 N.W.2d 77 (1988), even though the young child is not an alleged victim of sexual abuse.

State v. Jagielski, 161 Wis. 2d 67, 73–74, 467 N.W.2d 196 (Ct. App. 1991).

It is appropriate to admit a four-year-old's statements concerning a sexual assault through a social worker, when the statements are otherwise proven sufficiently trustworthy. In doing so, a trial court should consider the five factors established in *State v. Sorenson*, 143 Wis. 2d 226, 245–46, 421 N.W.2d 77 (1988): (1) the child's attributes; (2) the person to whom the child makes the statement; (3) the circumstances under which the child makes the statement; (4) the content of the statement; and (5) other corroborating evidence.

State v. Sorenson, 143 Wis. 2d 226, 245–46, 421 N.W.2d 77 (1988).

Courts applying the residual hearsay exception to a child victim's statements in a sexual-assault case must consider five factors before determining whether the statements are admissible.

First, the court should examine the attributes of the child making the statement, including the child's ability to communicate and comprehend the statements or questions of others, to know the difference between truth and falsehood, and any fear of punishment, retribution, or other personal interest, such as close familial relationship with the defendant, expressed by the child, which might affect the child's method of articulation or motivation to tell the truth.

Second, the court should examine the person to whom the statement was made, focusing on the person's relationship to the child, whether that relationship might have an impact on that statement's trustworthiness, and any motivation of the recipient of the statement to fabricate or distort its contents.

Third, the court should review the circumstances under which the statement was made, including its relation to the time of the alleged assault, the availability of a person in whom the child might confide, and other contextual factors that might enhance or detract from the statement's trustworthiness.

Fourth, the court should examine the content of the statement itself, particularly noting any sign of deceit or falsity and whether the statement reveals knowledge of matters not ordinarily attributable to a child of similar age.

Fifth, other corroborating evidence, such as physical evidence of assault, statements made to others, and opportunity or motive of the defendant, should be examined for consistency with the assertions made in the statement.

State v. Lindner, 142 Wis. 2d 783, 792–94, 419 N.W.2d 352 (Ct. App. 1987).

This exception is designed to allow for the growth of the evidence code to provide for "unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions." A complainant's statements to her teacher regarding her sexual assault were admissible under this exception. The complainant's response to the teacher's inquiry, after the teacher noticed the complainant becoming "uneasy or fidgety" during a film about sexual abuse, showed a trustworthiness within the spirit of the excited utterance exception to the hearsay rule. Even though three weeks had passed since the assault, the evidence was not too remote in time, because the film was an independent triggering event as opposed to a specific leading question asked in a lengthy interview.

State v. Hinz, 121 Wis. 2d 282, 289, 360 N.W.2d 56 (Ct. App. 1984).

A blood alcohol chart compiled by the DOT has such circumstantial guarantees of trustworthiness that it is admissible under this exception.

State v. Higginbotham, 110 Wis. 2d 393, 399 n.1, 329 N.W.2d 250 (Ct. App. 1982).

Authors' Note. See the first footnote in this case for a discussion of "reliable hearsay," "trustworthy hearsay," and "unsubstantiated hearsay."

Mitchell v. State, 84 Wis. 2d 325, 332–33, 267 N.W.2d 349 (1978).

Statements made to the police over the telephone by the victim concerning the theft of an automobile have some guarantees of trustworthiness, but they do not have sufficient guarantees of trustworthiness to be admissible under this exception.

This exception focuses, as do all of the enumerated hearsay exceptions, on the character of the statements and the circumstances under which they are made, not on the type of judicial forum at which the statement is offered. Restricting the forum at which such statements can be used does not provide the guarantees of trustworthiness contemplated by this rule.

Wirth v. State, 55 Wis. 2d 11, 14–15, 197 N.W.2d 731 (1972).

The statement on the label on a sealed bottle containing a narcotic drug, which was prepackaged and sealed by a pharmaceutical manufacturer and relied on by a pharmacist, was supported by sufficient surrounding circumstances to satisfy the probability of trustworthiness and thus was admissible.

▪

See also ....

State ex rel. Simpson v. Schwarz, 2002 WI App 7, ¶¶ 23–30, 250 Wis. 2d 214, 640 N.W.2d 527 (hearsay statements of six-year-old victim of sexual abuse admitted as Wis. Stat. § 908.03(24) evidence pursuant to criteria of *State v. Sorenson*, 143 Wis. 2d 226, 421 N.W.2d 77 (1988))

Heggy v. Grutzner, 156 Wis. 2d 186, 200–01, 456 N.W.2d 845 (Ct. App. 1990) (even if police officer's investigative report admissible, witness statements within it still inadmissible hearsay, if lacking in trustworthiness)

Liles v. Employers Mut. Ins., 126 Wis. 2d 492, 503–04, 377 N.W.2d 214 (Ct. App. 1985) (doctor's testimony in first phase of bifurcated trial inadmissible in second phase because, though reliable, it undercuts exception under Wis. Stat. § 908.045(1) for former testimony only when witness unavailable)

Johnson v. American Fam. Mut. Ins. Co., 93 Wis. 2d 633, 649, 287 N.W.2d 729 (1980) (judge's decision in prior trial inadmissible, when it referred only to selected evidence supporting verdict rather than to evidence in general)

Chapter 27

Hearsay Exceptions—Declarant Unavailable

908.04 Hearsay exceptions; declarant unavailable; definition of unavailability.

(1) "Unavailability as a witness" includes situations in which the declarant:

(a) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(b) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the judge to do so; or

(c) Testifies to a lack of memory of the subject matter of the declarant's statement; or

(d) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

(2) A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

Judicial Council Committee's Note (1974)

This section attempts to achieve uniformity in determination of the "necessity" aspect of receiving hearsay testimony, Wigmore section 1421.

Sub. (1)(a). There are no reported Wisconsin cases which equate the exercise of a privilege with unavailability of the witness.

(b) This provision would modify the decision in *Pleau v. State*, 255 Wis. 362, 38 N.W.2d 496 (1949).

(c) Although no Wisconsin case has expressed this doctrine as an unavailability basis for a hearsay exception, the rule is consistent with the rationale in *Schemenauer v. Travelers Indemnity Co.*, 34 Wis. 2d 299, 308, 149 N.W.2d 644, 648 (1967), where a plaintiff's claim of amnesia was under attack. The court held that such a circumstance was within the ambit of conduct by silence and justified the absent available witness instruction because it made his cross-examination unavailable to the defendants.

(d) Death as "unavailability" is in accord with Wisconsin cases concerning statements against interest, *Meyer v. Mutual Service Cas. Ins. Co.*, 13 Wis. 2d 156, 163, 108 N.W.2d 278, 282 (1961); *Harris v. Richland Motors, Inc.*, 7 Wis. 2d 472, 481, 96 N.W.2d 840, 844 (1959); *Dillenberg v. Carroll*, 259 Wis. 417, 422, 49 N.W.2d 444, 446 (1951); *Truelsch v. Miller*, 186 Wis. 239, 248, 202 N.W. 352, 356, 38 A.L.R. 914 (1925), and former testimony, *Estate of Sweeney*, 248 Wis. 607, 614, 22 N.W.2d 657, *rehearing denied* 248 Wis. 607, 24 N.W.2d 406, 407 (1946); *Zimdars v. Zimdars*, 236 Wis. 484, 489, 295 N.W. 675, 677 (1941). In *Markowitz v. Milwaukee E.R. & L. Co.*, 230 Wis. 312, 316, 284 N.W. 31, 33 (1939), relying upon *Spencer v. State*, 132 Wis. 509, 512, 112 N.W. 462, 463, 122 Am. St. Rep. 989, 13 Ann. Cas. 969 (1907), it was held that a witness must be in such a state, mentally or physically, or both, that in all reasonable probability he would never be able to attend a trial. It was also held that medical testimony that the witness was not capable "at the present time" of giving testimony did not establish unavailability. Note that *Markowitz* was a civil case but relied upon a statement in *Spencer*, a criminal case, where the decision was predicated upon an interpretation of the confrontation clause of the Wisconsin Constitution. The rule in *Markowitz* is changed by this provision to permit "present" unavailability to satisfy the rule. Whether the rule is changed in *Spencer* is a constitutional question requiring adjudication. There is ample authority in the federal decisions for a change in view with respect to whether it is a denial of confrontation rights. See Proposed Federal Rules, Article VIII, Introductory Note: The Hearsay Problem: Confrontation and Due Process, and *State v. LaFernier*, 44 Wis. 2d 440, 171 N.W.2d 408 (1969); *Gaertner v. State*, 35 Wis. 2d 159, 150 N.W.2d 370 (1967). *LaFernier* interprets s. 885.31, which predicates the former testimony exception to the hearsay rule upon the death or absence of a witness.

((e) Wisconsin law equates absence with unavailability as a satisfaction of the necessity aspect of hearsay. Section 885.31 applies to the former testimony exception and *Dillenberg v. Carroll*, 259 Wis. 417, 422, 49 N.W.2d 444, 446 (1951), refers to absence in a statement against interest exception. In *Dillenberg*, where the declarant was deceased, the court broadly stated the rule of unavailability of a witness as "died, became insane, or for some other reason is not available as a witness." S. 885.31 is "declaratory of the common-law rule generally adopted on that subject." *Estate of Sweeney*, 248 Wis. 607, 614, 22 N.W.2d 657, *rehearing denied* 248 Wis. 607, 24 N.W.2d 406, 407 (1946). The statute refers to absence from the state and temporary absence may not satisfy the statute, *State v. Anderson*, 219 Wis. 623, 629, 263 N.W. 587, 589 (1935); s. 908.04 refers only to absence from the hearing and this is a change in Wisconsin law. Diligent attempts to procure attendance of the

witness as a condition to invoking the concept of unavailability have been required by Wisconsin cases whether considered a confrontation matter in a criminal case, *State v. LaFernier*, 44 Wis. 2d 440, 171 N.W.2d 408 (1969), or a former testimony exception to the hearsay rule in a civil case, *Schofield v. Rideout*, 233 Wis. 550, 556, 290 N.W. 155, 158, 133 A.L.R. 834 (1940), and finds support in the parallel that a diligent effort to produce an original must be established before a copy satisfies the original writings rule, *Whalen v. State Farm Mut. Auto. Ins. Co.*, 51 Wis. 2d 635, 640, 187 N.W.2d 820, 822 (1971), and cases cited in comment to s. 910.04(1). The provision of this section that the proponent of the hearsay statements referred to in this section must establish his inability to procure the declarant's attendance "by process or other reasonable means" is not believed to be any departure from the "good-faith effort" of *LaFernier*, "due diligence" of *Inda v. State*, 198 Wis. 557, 224 N.W. 733 (1929), or the need to specify the facts showing diligence rather than a mere assertion or perfunctory showing of some diligence as referred to in *Whalen*.

The provision of the rule that the unavailability of the witness may not be "procured" by the proponent of his statement or by wrongdoing of the proponent has not been articulated in Wisconsin. It seems implicit in the required showing of "good-faith effort" or "due diligence." In drawing an adverse inference from failure to call a material witness, the court did not condition the inference upon an attempt to take a deposition of the absent witness, *Shaw v. Wuttke*, 28 Wis. 2d 448, 459, 137 N.W.2d 649, 654 (1965). This seems a parallel to s. 908.04 which is not conditioned upon an attempt to take a deposition.

Sub. (2). This subsection and s. 908.045(1) appear in conflict with ss. 887.12(7)(c) 1. to 6. which relate to the use of depositions. However those sections should be considered operative because s. 908.02 makes the hearsay rule subject to such statutes. The depositions must in turn satisfy the other rules of evidence, s. 887.12(7).

Authors' Note. The determination of unavailability must be made outside the presence of the jury. Particular care must be taken to avoid invoking a privilege before the jury. *See* Wis. Stat. § 905.13(2).

Case Annotations

(1) "Unavailability" Defined

State v. Hanna, 163 Wis. 2d 193, 204, 471 N.W.2d 238 (Ct. App. 1991).

A four-year-old girl was not unavailable although she would not give verbal responses. Her affirmative and negative nods indicated responses to questions that called for a yes or no answer. A witness is "unavailable" only if the witness meets one of the five criteria listed in Wis. Stat. § 908.04(1).

State v. Dwyer, 143 Wis. 2d 448, 462–63, 422 N.W.2d 121 (Ct. App. 1988), *aff'd*, 149 Wis. 2d 850, 440 N.W.2d 344 (1989).

A witness is "unavailable" only if the witness meets one of the five criteria listed in Wis. Stat. § 908.04(1). Lack of competency is not one of them.

(a) Witness Exempted by Privilege

State v. Marks, 194 Wis. 2d 79, 95–96, 533 N.W.2d 730 (1995).

A witness may invoke the privilege against self-incrimination even if already convicted and sentenced, as long as the witness has a real and appreciable fear of further incrimination, i.e., when an appeal is pending, before an appeal as of right or plea withdrawal time limit has expired, or when the witness intends to or is in the process of moving to modify his or her sentence and can show an appreciable chance of success.

State v. McConnohie, 121 Wis. 2d 57, 75–76, 358 N.W.2d 256 (1984).

Even though a person may possess a Fifth Amendment privilege, it is unknown whether the person will invoke that privilege until the person is called to trial. As such, the person is not unavailable as a witness until the person is called and invokes the privilege.

See also ....

State v. Whiting, 136 Wis. 2d 400, 413, 402 N.W.2d 723 (Ct. App. 1987) (witness "unavailable" if exempted from testifying based on privilege)

(b) Persists in Refusing to Testify

State v. Tomlinson, 2002 WI 91, ¶¶ 43–44, 254 Wis. 2d 502, 648 N.W.2d 367, *aff'g* 2001 WI App 212, 247 Wis. 2d 682, 635 N.W.2d 201.

If a witness persistently refuses to testify despite an order of the court to testify, even though the basis for that refusal is an improper invocation of his or her Fifth Amendment privilege, the witness may be declared "unavailable" under Wis. Stat. § 908.04(1)(b).

(c) Lack of Memory of Subject Matter

(d) Witness's Death or Illness

State v. Drusch, 139 Wis. 2d 312, 319–20, 407 N.W.2d 328 (Ct. App. 1987).

Expert medical testimony is not essential to a determination of illness. A witness so frightened and emotionally upset by the offense and the presence of the jury that she was unable to testify, and was likely to continue to be unable to do so, could be found, at the discretion of the court, unavailable because of a then existing mental illness or infirmity.

State v. Nelson, 138 Wis. 2d 418, 441–43, 406 N.W.2d 385 (1987).

A four-year-old child diagnosed as suffering considerable emotional trauma from sexual abuse was unavailable to testify.

State v. Smith, 125 Wis. 2d 111, 126–28, 370 N.W.2d 827 (Ct. App. 1985), *rev'd on other grounds*, 131 Wis. 2d 220, 388 N.W.2d 601 (1986).

A rambling, discordant, nonresponsive, and combative witness who appears to the court to be incompetent may be declared unavailable because of mental illness and that fact explained to the jury.

See also ....

State v. Burns, 112 Wis. 2d 131, 140, 332 N.W.2d 757 (1983) (witness suffering from mental illness at time of trial unavailable in circumstances of case)

(e) Witness Absent

State v. Baldwin, 2010 WI App 162, ¶¶ 46–51, 330 Wis. 2d 500, 794 N.W.2d 769.

The proponent of a witness must make a good-faith effort and exercise due diligence to secure the witness's presence. Issuance and service of a subpoena are sufficient to show a party's due diligence to secure a witness.

State v. King, 2005 WI App 224, ¶¶ 15–17, 287 Wis. 2d 756, 706 N.W.2d 181.

A witness is not "unavailable" merely because the witness declined to appear, if the state could have served the witness with a subpoena.

State v. Williams, 2002 WI 58, ¶¶ 62–66, 253 Wis. 2d 99, 644 N.W.2d 919.

A demonstration of sufficient efforts to secure the declarant's presence "by process or other reasonable means," under Wis. Stat. § 908.04(1)(e), requires a good-faith effort and due diligence. In addition, the proponent must "specify the facts showing diligence" and not rely on a mere assertion of diligence.

In this case, because the proponent of the hearsay evidence did not establish that he made any attempts to look for the witness in a place where he might logically have been, he failed to carry his burden of due diligence.

State v. Keith, 216 Wis. 2d 61, 73–74, 573 N.W.2d 888 (Ct. App. 1997).

Unsuccessful efforts by a detective to find the location of witnesses by searching Department of Transportation and Madison Police Department computer files were sufficient to be considered a reasonably diligent, good-faith effort to produce the witnesses.

State v. Temby, 108 Wis. 2d 521, 526, 322 N.W.2d 522 (Ct. App. 1982).

A temporary absence from the state for personal business reasons does not amount to unavailability as defined by Wis. Stat. § 908.04(1)(e).

State v. Zellmer, 100 Wis. 2d 136, 145–47, 301 N.W.2d 209 (1981).

The use of process to compel the attendance of a witness is not, in every case, essential to the determination of unavailability under Wis. Stat. § 908.04(1)(e). However, in criminal cases, district attorneys are strongly admonished to utilize the Uniform Extradition Act when it is available.

See also ....

La Barge v. State, 74 Wis. 2d 327, 338, 246 N.W.2d 794 (1976) (unavailability and due diligence to locate declarant determined by hearing outside presence of jury)

(2) Witness Unavailable Due to Proponent's Wrongdoing

State v. Frambs, 157 Wis. 2d 700, 703, 706, 460 N.W.2d 811 (Ct. App. 1990).

A witness's absence was due to the defendant's misconduct when testimony at a pretrial hearing by a police officer and the district attorney showed that the defendant had threatened witnesses in the past and had made threatening statements to this witness. Thus, the witness was not unavailable under Wis. Stat. § 908.04(2) and his hearsay statements could not be admitted on the defendant's behalf. The burden of proof as to the unavailability of a witness is the preponderance of the evidence.

908.045 Hearsay exceptions; declarant unavailable.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) FORMER TESTIMONY. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.

(2) STATEMENT OF RECENT PERCEPTION. A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear.

(3) STATEMENT UNDER BELIEF OF IMPENDING DEATH. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

(4) STATEMENT AGAINST INTEREST. A statement which was at the time of its making so far contrary to the declarant's pecuniary or propriety interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.

(5) STATEMENT OF PERSONAL OR FAMILY HISTORY OF DECLARANT. (a) A statement concerning the declarant's own birth, adoption, marriage, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated.

(5m) STATEMENT OF PERSONAL OR FAMILY HISTORY OF PERSON OTHER THAN THE DECLARANT. A statement concerning the birth, adoption, marriage, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of personal or family history and death of a person other than the declarant, if the declarant was related to the other person by blood, adoption or marriage or was so intimately associated with the other person's family as to be likely to have accurate information concerning the matter declared.

(6) OTHER EXCEPTIONS. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

Judicial Council Committee's Note (1974)

Sub. (1). This rule is a minor change in Wisconsin law. In *Feldstein v. Harrington*, 4 Wis. 2d 380, 90 N.W.2d 566 (1958), ss. 885.31 and 887.17 were considered. Section 885.31 has been described as declaratory of the common law in Estate of Sweeney, 248 Wis. 607, 22 N.W.2d 657, *rehearing denied* 248 Wis. 607, 24 N.W.2d 406 (1946). In *Feldstein* the need for identity of parties was eliminated as "only an incident or corollary" of substantial identity of issue. Substantial identity of issue (s. 885.31) was held to be a basis for ascertaining that the person against whom the evidence was offered has a similar interest and motive in his opportunity for cross-examination, *Feldstein*, *supra* at 387. Thus, the elimination of substantial identity of issue from this rule is more a change of language than substance. The underlying question is similar interest and motive—substantial identity of issue, while not compelled, continues to be one of the incidents or corollaries to ascertaining the requisite interest and motive, *Illinois Steel Co. v. Muza*, 164 Wis. 247, 159 N.W. 908 (1916). The rule is consistent with Wisconsin law in equating direct examination with cross-examination for the purpose of receiving "former testimony against the party by whom it was previously offered." *Roberts v. Gerber*, 187 Wis. 282, 290, 202 N.W. 701, 704 (1925). Section 887.12, requiring identity of parties for the use of depositions is not exclusive in the use of depositions, *Feldstein*, *supra*, and unavailability requirements must be met whether a deposition of a nonparty is taken in the proceeding or to perpetuate his testimony. *Jolin v. Oster*, 55 Wis. 2d 199, 198 N.W.2d 639 (1972); *Schoenauer v. Wendinger*, 49 Wis. 2d 415,

182 N.W.2d 441 (1971). The confrontation problems referred to in the Federal Advisory Committee's Note are for resolution as constitutional rather than evidence law problems in keeping with the form and purpose of these rules of evidence. See s. 971.23(6) for depositions of witness in criminal cases. Section 885.31 is repealed.

Sub. (2). This sub. is a major change in Wisconsin law which presently would characterize the statement as inadmissible hearsay. Note that this provision and all other provisions in this section are conditioned upon the unavailability of the declarant and contain limitations as assurances of accuracy not contained in the comparable provisions of the Model Code or Uniform Rules.

Sub. (3). This sub. is a change in Wisconsin law which limits a statement under belief of impending death to information concerning the cause or circumstances of such impending death and to homicide cases. *Schabo v. Wolf-Pepper T. & S. Co.*, 201 Wis. 190, 229 N.W. 549 (1930). Its applicability is expanded to civil cases. Implicit in such expansion is the rejection of the erroneous proposition which originated in a misunderstanding of the first-hand knowledge requirement, that the statement may not contain opinions, and rejection of the limitation that the statement can be offered only in a case where the defendant is charged with the death of the declarant, e.g., heretofore a declaration by a rape victim who died in childbirth was inadmissible in a rape case. These principles have never, however, been expressly adopted in Wisconsin. Also, death of the declarant is no longer the sole test of unavailability.

Where unavailability of the declarant is caused by death, there are no confrontation problems. *State v. Dickinson*, 41 Wis. 299, 308 (1877); Federal Advisory Committee Note to s. 908.045(1). With the expanded definition of unavailability in s. 908.04, confrontation problems may arise.

Note that a statement under belief of impending death is limited to the cause or circumstances surrounding the death while a statement against interest embraces facts contained in the statement other than the mere against-interest declaration. However, inconsistent hearsay statements that tend to impeach a dying declaration are admissible and offer a wider range of admissible evidence than the original declaration, *Werner v. State*, 189 Wis. 26, 36, 206 N.W. 898, 902 (1926). The proponent of the declaration must establish the foundation that the declarant believed that death was impending, *Schlesak v. State*, 232 Wis. 510, 519, 287 N.W. 703, 707 (1939); *State v. Law*, 150 Wis. 313, 321, 136 N.W. 803, 806, 137 N.W. 457 (1912); however belief of impending death may be inferred from the fact of death and circumstances such as the nature of the wound, *Oehler v. State*, 202 Wis. 530, 534, 232 N.W. 866, 868 (1930).

Sub. (4). Wisconsin cases are generally in accord with this sub. *Meyer v. Mutual Serv. Cas. Ins. Co.*, 13 Wis. 2d 156, 163, 108 N.W.2d 278, 282 (1961); *Harris v. Richland Motors Inc.*, 7 Wis. 2d 472, 481, 96 N.W.2d 840, 844 (1959); *Dillenberg v. Carroll*, 259 Wis. 417, 422, 49 N.W.2d 444, 446 (1951); *Truelsch v. Miller*, 186 Wis. 239, 248, 202 N.W. 352, 356, 38 A.L.R. 914 (1925). Changes effected by this sub. which expand the concept of "against pecuniary or proprietary interest" to civil or criminal liability, rendering invalid a claim by the declarant against another, or making the declarant the object of hatred, ridicule or disgrace have not been the subject of prior Wisconsin adjudication but are changes in general common law. Note that these changes incorporate a "reasonable man" test. Excluded from "statements against interest" are statements of a declarant tending to expose him to criminal liability and offered to exculpate the accused, unless the declarant's statement is corroborated.

This sub. does not modify the rule of *Meyer* that evidence of so much of a hearsay declaration is admissible as consists of a declaration against interest and such additional parts thereof, including matter incorporated by reference, as the judge finds to be so closely connected with the declaration against interest as to be equally trustworthy. 13 Wis. 2d at 164, 108 N.W.2d at 282.

See comment to sub. (3) *supra*, noting the difference in this respect from a statement under belief of impending death.

The frequent use of the term "admissions against interest" merits this explanation by McCormick section 240:

> A type of evidence with which admissions may be confused is evidence of Declarations against Interest. Such declarations, coming in under a separate exception to the hearsay rule, to be admissible must have been against the declarant's interest when made. No such requirement applies to admissions. If a party states that a note or deed is forged, and then later buys the note or the land, obviously the previous statement will come in against him as an admission, though he had no interest when he made the statement. Of course, most admissions are actually against interest when made, but there is no such requirement. Hence the common phrase in judicial opinions, "admissions against interest," is an invitation to confuse two separate exceptions to the hearsay rule. Other apparent distinctions are that the admissions must be the statements of a party to the lawsuit (or his predecessor or representative) and must be offered, not for, but against him, whereas the Declaration against Interest need not be and usually is not made by a party or his predecessor or representative, but by some third person. Finally, the Declaration against Interest exception admits the declaration only when the declarant, by death or otherwise, has become unavailable as a witness, whereas obviously no such requirement is applied to admissions of a party.

Sub. (5). The Wisconsin cases are in accord with item (a), *Estate of Cogan*, 267 Wis. 20, 23, 64 N.W.2d 454, 456 (1954); *Smith v. Smith*, 140 Wis. 599, 603, 123 N.W. 146, 147 (1909), and also in accord with item (b), *Estate of Engelhardt*, 272 Wis. 275, 288, 75 N.W.2d 631, 638 (1956); *Estate of Cogan*, *supra*; *Estate of Dexheimer*, 197 Wis. 145, 151, 221 N.W. 737, 740 (1928); *DuPont v. Davis*, 30 Wis. 170, 178 (1872); *Eaton v. Tallmadge*, 24 Wis. 217, 222 (1869). The elimination of the ante litem motam requirement is a change in Wisconsin law, *Estate of Cogan*, *supra*,

at 24, but expanding qualified declarants from those related by blood or marriage to include those intimately associated with the family is not a change in Wisconsin law (cited cases, *supra*). There has been no Wisconsin adjudication that the declarant must have the qualifying status with respect to both persons about whose relationship his declaration is admitted.

Case Annotations

(1) Former Testimony

Authors' Note. The annotations under this subsection no longer include criminal cases predating *Crawford v. Washington*, 541 U.S. 36 (2004). As the court noted in *State v. Hale*, 2005 WI 7, ¶ 42 n.6, 277 Wis. 2d 593, 691 N.W.2d 637, this subsection is "largely academic" after *Crawford*.

State v. Stuart, 2005 WI 47, ¶¶ 23–38, 279 Wis. 2d 659, 695 N.W.2d 259.

The preliminary hearing testimony of a declarant who was unavailable as a trial witness because he invoked his Fifth Amendment privilege was improperly admitted. Because the defendant did not have the opportunity to question the declarant about a potential motive to testify falsely, the use of the declarant's testimony violated the defendant's right to confrontation. *See Crawford v. Washington*, 541 U.S. 36 (2004).

State v. Hale, 2005 WI 7, ¶¶ 40, 52–58, 277 Wis. 2d 593, 691 N.W.2d 637.

Co-actors had separate trials for charges arising out of an armed robbery that left two people murdered. A witness testified at the first trial that he provided the gun used in the murder. When the witness could not be found for the second co-actor's trial, the trial court erroneously exercised its discretion by admitting the witness's testimony at the second trial under the former testimony hearsay exception.

Under *Crawford v. Washington*, 541 U.S. 36 (2004), the admitted testimony in this case, being "testimonial" in nature, violated the defendant's right to confrontation because, even though the declarant was unavailable, the defendant did not have a prior opportunity to cross-examine. The state could not rely on the cross-examination by "proxy" of the declarant at the co-actor's trial. The error was found to be harmless.

(2) Statement of Recent Perception

State v. Manuel, 2005 WI 75, 281 Wis. 2d 554, 697 N.W.2d 811.

A witness's out-of-court statement to his girlfriend regarding a shooting and the defendant's involvement was not "testimonial" under *Crawford v. Washington*, 541 U.S. 36 (2004). It was properly admitted as a statement of recent perception under Wis. Stat. § 908.045(2). The analysis of *Ohio v. Roberts*, 448 U.S. 556 (1980) (requiring that (1) the declarant be unavailable and that (2) the declarant's statement bear adequate "indicia of reliability"), is retained for scrutinizing nontestimonial statements under the Confrontation Clause and Wis. Const. art. 1, § 7. By the *Roberts* analysis, the statement of recent perception hearsay exception is not "firmly rooted"; thus, to be admissible under that exception, a statement must have particularized guarantees of trustworthiness.

In this case, indicia of reliability included a spontaneous statement made in good faith to someone the declarant trusted and in whom he had confided, when there was nothing in the record to suggest the declarant lied, and there was a satisfactory explanation for the declarant's flight with his girlfriend and infant son to a nearby hotel.

State v. Kutz, 2003 WI App 205, ¶¶ 50–54, 63, 267 Wis. 2d 531, 671 N.W.2d 660.

In a prosecution for first-degree intentional homicide, hiding a corpse, stalking, and obstructing an officer, the trial court did not err by denying the defendant's motion to exclude the victim's statements to others that the defendant was following her. These statements fell within the hearsay exception for recent perception because it was reasonable to infer that the victim was relating conduct that had recently occurred and there was no indication that the victim did not have a clear recollection when she related these statements. The existence of corroboration is not a general requirement under Wis. Stat. § 908.045(2).

Furthermore, the victim's statements to others about threats that the defendant made were not admissible under the recent perception exception, because the exception "does not apply to the aural perception of an oral statement privately told to a person."

State v. Weed, 2003 WI 85, ¶¶ 14–21, 263 Wis. 2d 434, 666 N.W.2d 485.

In a prosecution for first-degree intentional homicide, the deceased victim's statement was properly admitted under the recent perception exception to the hearsay rule, because the statement was not made in response to any pending or anticipated investigation or litigation, it was likely made within eight days after the event recently perceived, and there was no indication that the declarant's recollection was not clear.

The recent perception exception is similar to the present sense impression and excited utterance exceptions. It differs, however, because it allows more time between the observation of the event and the statement, which may be admitted even when the declarant is unavailable.

State v. Ballos, 230 Wis. 2d 495, 506–07, 602 N.W.2d 117 (Ct. App. 1999).

In a prosecution for arson, transcripts of 911 tape recordings from unidentified callers reporting the fire and describing a license plate number of a car at the scene of the fire were properly admitted as statements of recent perception. Such calls are presumed to be "made in good faith,"

that is, not in response to the instigation of anyone else.

The recent perception exception, while similar to the present sense impression (Wis. Stat. § 908.03(1)) and excited utterance (Wis. Stat. § 908.03(2)) exceptions, is intended to allow more time between the observation of the event and the statement.

Authors' Note. *Ballos* was decided before *Crawford*. In *Davis v. Washington*, 547 U.S. 813 (2006), the Court held that a party's statements during a 911 call were not testimonial. The statements were made to describe current circumstances requiring police assistance, while the events were actually happening, in the face of an ongoing emergency.

Kluever v. Evangelical Reformed Immanuels Congregation, 143 Wis. 2d 806, 813–16, 422 N.W.2d 874 (Ct. App. 1988).

The declarant's statement, which was made from his hospital bed 8–10 weeks after his fall during one of his few "islets of memory," was a statement of recent perception because the declarant's concept of time was "an amorphous one considering his condition." Any evidence of the declarant's lack of clear recollection went to the weight of the evidence.

Tim Torres Enters., Inc. v. Linscott, 142 Wis. 2d 56, 77–78, 416 N.W.2d 670 (Ct. App. 1987).

A statement of the declarant's state of mind does not satisfy the requirement of Wis. Stat. § 908.045(2) that the statement narrate, decide, or explain the event or condition. Moreover, it is necessary that the witness be able to identify when the declarant's statement was made in order to show that it was related to a recently perceived event.

See also ....

State v. Kreuser, 91 Wis. 2d 242, 250, 280 N.W.2d 270 (1979) (witness's statement about license number on stolen truck made within a day after seeing vehicle fell within exception)

Christensen v. Economy Fire & Cas. Co., 77 Wis. 2d 50, 63 n.13, 252 N.W.2d 81 (1977) (trial court afforded wide discretion in deciding whether time lapse between triggering event and statement was sufficiently short to qualify statement as present sense impression and whether statement was made in good faith without contemplation of anticipated litigation)

West v. State, 74 Wis. 2d 390, 401, 246 N.W.2d 675 (1976) (trial court did not erroneously exercise discretion in refusing to admit exculpatory statements of accomplices; evidence of prior plan not to implicate defendant showed lack of good faith on part of witness)

(3) Statement Under Belief of Impending Death

State v. Beauchamp, 2011 WI 27, ¶¶ 16–35, 333 Wis. 2d 1, 796 N.W.2d 780.

The defendant was convicted of shooting a man to death. An emergency medical technician and a police officer who were attending to the victim before his death testified that the victim identified the defendant as the shooter. The victim's statements were properly admitted as falling within the dying-declaration exception to the rule against hearsay.

The dying declarations, while in this case were assumed testimonial in nature and were not subject to cross-examination, were constitutionally admitted under *Crawford v. Washington*, 541 U.S. 36 (2004), because the dying declaration was a recognized exception to the hearsay rule at the founding of the U.S. and Wisconsin Constitutions.

State v. Owens, 2016 WI App 32, ¶¶ 10–13, 368 Wis. 2d 265, 878 N.W.2d 736.

Hearsay testimony by a law enforcement officer recounting the statement of a dying gunshot victim was admissible as a dying declaration because the nature and extent of the declarant's wounds were such that the declarant must have felt or known he could not survive. Dying declarants need not specifically comment on whether they believe they are going to die.

(4) Statement Against Interest

State v. Guerard, 2004 WI 85, ¶¶ 32–42, 273 Wis. 2d 250, 682 N.W.2d 12.

The standard for corroboration of a statement against penal interest is corroboration sufficient to enable a reasonable person to conclude in light of all the facts and circumstances that the statement *could* be true. Corroboration independent of a confession is not required. In this case, the confession of an unavailable witness was sufficiently "self-corroborating," having been repeated in substantially the same form to two other witnesses. Exclusion of a statement is not required merely because there is conflicting evidence that renders the corroboration "debatable."

State v. Tucker, 2003 WI 12, ¶¶ 28–32, 259 Wis. 2d 484, 657 N.W.2d 374.

In a prosecution for an offense involving cocaine possession, the trial court properly ruled inadmissible an unavailable witness's statements from the defendant's investigator's interview. Although the defendant argued that the statements demonstrated that the drugs belonged to that

witness and not the defendant, the trial court properly determined that the statements were ambiguous and not clearly against the unavailable witness's penal interest.

State v. Joyner, 2002 WI App 250, ¶ 18, 258 Wis. 2d 249, 653 N.W.2d 290.

In considering whether a narrative hearsay statement that is purported to be against an unavailable declarant's interest is admissible as an exception to the hearsay rule, the court must first break down the narrative into each declaration or remark. The court must then separately evaluate whether each assertion is against the declarant's penal interest.

State v. Williams, 2002 WI 58, ¶¶ 62–63, 253 Wis. 2d 99, 644 N.W.2d 919.

Unavailability for purposes of Wis. Stat. § 904.045(4) is determined by Wis. Stat. § 908.04(1)(e), which requires the declarant's absence from the hearing and inability of the proponent of the statement to procure the declarant by process or other reasonable means. *Other reasonable means* requires a good-faith effort and due diligence. A mere assertion of some diligence is insufficient.

State v. Murillo, 2001 WI App 11, ¶¶ 9–19, 240 Wis. 2d 666, 623 N.W.2d 187.

In determining whether to admit a statement under the "social interest exception" to the rule against hearsay, the court must consider first, objectively, whether the declarant actually faced a risk of hatred, ridicule, or disgrace, and, second, whether the declarant's demeanor, words, and actions subjectively reveal that the declarant appreciated the risks of hatred, ridicule, or disgrace.

In this case, the declarant provided a statement to the police implicating his brother for shooting a man to death. In bringing himself to make the statement, the declarant was in great angst, because of his relationship to the accused. The objective test of the social interest exception was met here by the fact that the declarant turned in a person who was his brother and fellow gang member. The perceived disloyalty the declarant would experience from his family and gang members was self-evident. Regarding the subjective test, the court found that the declarant's visible demonstration of emotion at the time of the statement, as recounted by the officer who had questioned him, reflected the declarant's truthful state of mind. Accordingly, the statement was admissible.

Authors' Note. *But see Murillo v. Frank*, 316 F. Supp. 2d 744 (E.D. Wis. 2004), *aff'd*, 402 F.3d 786 (7th Cir. 2005).

State v. Johnson, 181 Wis. 2d 470, 482, 510 N.W.2d 811 (Ct. App. 1993).

A statement made by a defendant's brother inculpating himself and exculpating the defendant was insufficiently corroborated for a reasonable person to conclude it could be true, and it was therefore properly excluded.

The court must use a conditional relevance analysis under Wis. Stat. § 901.04(2), but the court neither weighs credibility nor makes a finding that the government has proved the conditional fact by the preponderance of evidence. The court must decide whether the jury could reasonably find the conditional fact by the preponderance of the evidence.

Authors' Note. *But see State v. Guerard*, 2004 WI 85, 273 Wis. 2d 250, 682 N.W.2d 12.

State v. Stevens, 171 Wis. 2d 106, 113–14, 118, 490 N.W.2d 753 (Ct. App. 1992).

The reliability of hearsay statements falling under this exception is based on the psychological assumption that persons do not make statements that are damaging to themselves unless satisfied for good reason that they are true.

The social interest exception has both objective and subjective poles. The objective pole is a determination that the declarant actually faced the risk of hatred, ridicule, or disgrace. The subjective pole concerns the declarant's appreciation of that risk. The real issue in dealing with this exception is the declarant's personal connection to the activity reported in his or her declaration. The exception demands that the declarant have a personal interest in keeping the statement secret, which guarantees reliability. Without this requirement for personal connection to the event or activity reported in the hearsay statement, the exception would permit the admission of any statement when it can be shown the declarant will be intensely disliked by someone for making the statement.

State v. Whitaker, 167 Wis. 2d 247, 254, 481 N.W.2d 649 (Ct. App. 1992).

The corroboration required before a statement against a claimant's interest may be received into evidence to exculpate an accused must be sufficient to permit a reasonable person to conclude, in light of all the facts and circumstances, that the statement could be true.

Originally, the declarant had told the police that the defendant was wearing a particular hat on the night of the crime. Later, the declarant made a written out-of-court statement, exculpating the defendant, that he himself had worn the hat. The trial court correctly excluded the written statement because it was not sufficiently corroborated, in light of the earlier conflicting statement.

State v. Pepin, 110 Wis. 2d 431, 434, 439, 328 N.W.2d 898 (Ct. App. 1982).

Only the specific portion of a hearsay statement that is actually against the declarant's interest, and those portions so closely connected as to be equally trustworthy, may be admitted. The rule on admissibility of declarations against interest contains the element of "no probable motive to falsify." This element must apply equally to all parts of the statement. If the conditions surrounding the making of a declaration against interest do not ensure such trustworthiness, the entire statement ought not to be admitted into evidence as an exception of the hearsay rule.

State v. Lenarchick, 74 Wis. 2d 425, 429 n.1, 247 N.W.2d 80 (1976).

The phrase "admission against penal interest" is appropriate only when the statement or admission of a third party is sought to be introduced in exculpation of the defendant. A statement by a party is an "admission" admissible because it is not hearsay.

Authors' Note. *But see Crawford v. Washington*, 541 U.S. 36 (2004); *State v. Hale*, 2005 WI 7, 277 Wis. 2d 593, 691 N.W.2d 637.

See also ....

State v. Denny, 163 Wis. 2d 352, 358, 471 N.W.2d 606 (Ct. App. 1991) (codefendant's confession was "statement against interest" and also admissible if it contained particularized guarantees of trustworthiness or sufficient indicia of reliability)

State v. Sorenson, 143 Wis. 2d 226, 241, 421 N.W.2d 77 (1988) (child's statements to social worker regarding sexual assault by father not admissible, because not established that child was cognizant of impact of her statements; exception specifically requires a showing to substantiate veracity of such statements)

State v. Anderson, 141 Wis. 2d 653, 660, 416 N.W.2d 276 (1987) (exception less restrictive than comparable provision of Federal Rules of Evidence; Wisconsin rule requires corroboration sufficient to permit reasonable person to conclude that statement could be true)

State v. Buelow, 122 Wis. 2d 465, 476–77, 363 N.W.2d 255 (Ct. App. 1984) (declarant's John Doe testimony and voluntary statement to police both admissible as statements against interest)

(5) Statement of Personal or Family History of Declarant

(5m) Statement of Personal or Family History of Person Other Than the Declarant

State v. Jacobs, 2012 WI App 104, ¶ 27, 344 Wis. 2d 142, 822 N.W.2d 885.

If a case fails the relevance test, no other evidentiary issue can alter that. Satisfaction of a hearsay exception, for example, does not somehow make otherwise-irrelevant evidence admissible. A victim's mother's testimony regarding the victim's personal history was not relevant in a prosecution for homicide by intoxicated use of motor vehicle and, therefore, was not admissible.

(6) Other Exceptions

State v. Anderson, 2005 WI 54, ¶¶ 57, 59–63, 280 Wis. 2d 104, 695 N.W.2d 731.

The residual hearsay exception requires establishment of "circumstantial guarantees of trustworthiness," which include the following:

1. When the circumstances of the statement are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed;
2. When, even though a desire to falsify might present itself, other considerations such as the danger of easy detection or the fear of punishment would probably counteract its force; and
3. When the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.

In this case, the defendant was charged with the murder of his father. The hearsay testimony arose from a discussion between the father and a coworker about problems they were experiencing with their adult sons. The deceased revealed a story about his son, who attacked and threatened to kill him.

The court found no motive to fabricate based on the nature of this conversation because the father (1) indicated that he was not going to be contacting the authorities about the assault; (2) indicated in the conversation that he knew how he was going to die, demonstrating his sincerity and giving no indication he was joking; and (3) opened himself and his family to criticism or embarrassment by the statement that the attacker was a close family member rather than a stranger.

The fact that the statement was made under circumstances similar to those forming the basis for the excited utterance exception weighed heavily in favor of admissibility. The deceased was visibly upset and shaking during the spontaneous conversation, although missing was evidence of when the attack occurred.

State v. Petrovic, 224 Wis. 2d 477, 484–90, 592 N.W.2d 238 (Ct. App. 1999).

In a prosecution for the manufacture of a controlled substance, out-of-court statements made by a five-year-old girl incriminating her mother were permissible under Wis. Stat. § 908.045(6). The child's live trial testimony was properly excused because, even though she was not a victim witness, forcing the child to testify against her mother presented an exigent circumstance sufficiently similar to the psychological scarring of forcing a child victim of sexual assault to testify. The child's statements were deemed sufficiently trustworthy under the five-part test set forth in *State v. Sorenson*, 143 Wis. 2d 226, 245–46, 421 N.W.2d 77 (1988), and the court concluded that she acted voluntarily and without motive to lie.

State v. Stevens, 171 Wis. 2d 106, 120, 490 N.W.2d 753 (Ct. App. 1992).

The key to determining admissibility under this exception is the "circumstances surrounding the making of the hearsay statement." Residual hearsay exceptions require the proponent to establish circumstantial guarantees of trustworthiness comparable to those existing for enumerated exceptions. This is not a "catchall" or "near miss" category that permits the admission of otherwise unacceptable hearsay. This exception is for the novel or unanticipated category of evidence that is as reliable as the named categories and should be used rarely.

State v. Sorenson, 143 Wis. 2d 226, 243–46, 421 N.W.2d 77 (1988).

This exception was designed to provide the flexibility needed to permit growth and development of the law of evidence. While not contemplating unfettered judicial discretion, its use was intended to allow admission of evidence under new and unanticipated situations that demonstrate a trustworthiness consistent with that required under other specifically stated exceptions.

In the absence of a specific hearsay exception governing young children's statements in sexual assault cases, use of the residual exception is an appropriate method to admit these statements if they are otherwise proven sufficiently trustworthy.

The guarantees of trustworthiness that should be examined are (1) the attributes of the child; (2) the person to whom the statement was made; (3) the circumstances under which the statement is made; (4) the content of the statement; and (5) other corroborating evidence.

The weight accorded to each factor may vary. However, no single factor may be dispositive of a statement's trustworthiness.

State v. Higginbotham, 110 Wis. 2d 393, 399 n.1, 329 N.W.2d 250 (Ct. App. 1982).

Authors' Note. See the first footnote in this case for a discussion of "reliable hearsay," "trustworthy hearsay," and "unsubstantiated hearsay."

Chapter 28
Special Problems

908.05 Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in this chapter.

Judicial Council Committee's Note (1974)

This section addresses itself to the proposition that hearsay within hearsay is not admissible by virtue of an exception applicable to the hearsay within which the multiple hearsay is enveloped but must be independently qualified for admission. Such a rule has not been articulated in Wisconsin cases but it is consistent with the disposition of cases that have embraced the problem. The problem was identified but not analyzed in *State ex rel. Leonard v. Rosenthal*, 123 Wis. 442, 447, 102 N.W. 49, 50 (1905):

> That this evidence is strictly hearsay evidence cannot be successfully denied. Indeed, some of it was the second degree of hearsay, if such an expression may be coined, for the reason that it was based upon like investigations of other persons who stated their results to the witnesses who were on the stand, who then gave them at second hand to the court. We recognize the great practical difficulty in proving the fact of nonresidence but we have not been able to convince ourselves that this difficulty justifies so serious an infraction of the rule excluding hearsay evidence.

In *Wilder v. Classified Risk Ins. Co.*, 47 Wis. 2d 286, 289, 177 N.W.2d 109, 112 (1970), and *Jacobson v. Bryan*, 244 Wis. 359, 366, 12 N.W.2d 789, 793 (1944), statements in a police accident report were held inadmissible unless the officer could have testified to the statements from the witness stand. Thus, the officer's nonexpert opinion in *Jacobson* was inadmissible because of the lack of firsthand knowledge; in *Wilder* the officer's testimony about a bystander's statements was inadmissible because the circumstances attending the bystander's statement did not invoke a hearsay exception. *Also see Novakofski v. State Farm Mut. Auto. Ins. Co., of Bloomington*, 34 Wis. 2d 154, 148 N.W.2d 714, A.L.R.3d 411 (1967); *Smith v. Rural Mut. Ins. Co.*, 20 Wis. 2d 592, 601, 123 N.W.2d 496, 502 (1963); *Lubner v. Peerless Ins. Co.*, 19 Wis. 2d 364, 372, 120 N.W.2d 54, 58 (1963) followed in 269 Wis. 218, 68 N.W.2d 804; *Estate of Eannelli*, 269 Wis. 192, 212, 68 N.W.2d 791, 801 (1955). Although s. 908.05 will provide a more explicable and predictable rationale, it will not solve problems such as that in *Whalen v. State Farm Mut. Auto. Ins. Co.*, 51 Wis. 2d 635, 639, 187 N.W.2d 820, 822 (1971), where it was determined that a statute directed to authentication of documents was not "to be used to 'bootstrap' into evidence hearsay evidence not clearly encompassed within its definition;" nor whether a medical opinion in a hospital record is admissible in evidence as direct proof of the fact by virtue of a regularly conducted activity exception to the hearsay rule. *Gibson v. State*, 55 Wis. 2d 110, 117, 197 N.W.2d 813, 818 (1972). These questions will be governed by the interpretation of the evidentiary rules and possibly in the latter instance by confrontation principles.

Authors' Note. *See also* Wis. Stat. § 889.11 (provides that written certification by official court reporter indicating that transcript is true and correct copy of proceedings held at trial or hearing is admissible in lieu of reporter's oral testimony).

Case Annotations

State v. Ballos, 230 Wis. 2d 495, 508, 602 N.W.2d 117 (Ct. App. 1999).

In a prosecution for arson, transcripts of 911 tape recordings from unidentified callers reporting the fire and describing a license plate number of a car at the scene of the fire were hearsay within hearsay, but were nevertheless admissible, since the statements themselves were admissible as present sense impressions (Wis. Stat. § 908.03(1)), excited utterances (Wis. Stat. § 908.03(2)), or statements of recent perception (Wis. Stat. § 908.045(2)), and the transcripts were admissible as records of regularly conducted activity (Wis. Stat. § 908.03(6)), which include police records.

State v. Whiting, 136 Wis. 2d 400, 421, 402 N.W.2d 723 (Ct. App. 1987).

A third party's statement to a police officer that the defendant admitted committing the crime was admissible when the third party testified that he could not remember making a statement to that police officer. It is within the discretion of the trial court to declare a denial of memory "inconsistent testimony."

Authors' Note. Although the court treated this as a double hearsay problem, there was only one level of hearsay involved here, since, by definition, an "admission" is not hearsay. See also *State v. Lukensmeyer*, 140 Wis. 2d 92, 109, 409 N.W.2d 395 (Ct. App. 1987), in which a similar analysis was conducted. The authors do not believe that such an analysis is necessary under these circumstances.

Boyer v. State, 91 Wis. 2d 647, 662–63, 284 N.W.2d 30 (1979).

The language of this section applies to all levels of hearsay. With each increased level of hearsay there is a corresponding decrease in reliability. To be admissible, each level of hearsay must conform to an exception to the hearsay rule. A trial judge has the discretion under Wis. Stat. § 904.03 to exclude multiple hearsay, even if each portion conforms to a statutory exception, if the judge finds the statement so unreliable that its probative value is substantially outweighed by the danger of prejudice and confusion.

See also ....

State v. Robles, 157 Wis. 2d 55, 61–63, 458 N.W.2d 818 (Ct. App. 1990) (statements made to interpreter and relayed to interrogator are not inadmissible double hearsay, because interpreter becomes defendant's agent and translation is attributable to defendant as defendant's own admission), *aff'd on different grounds sub nom*. *State v. Martin*, 162 Wis. 2d 883, 470 N.W.2d 900 (1991)

State v. Kreuser, 91 Wis. 2d 242, 249, 280 N.W.2d 270 (1979) (each component of combined statements must be examined when double hearsay objection is made)

Mitchell v. State, 84 Wis. 2d 325, 330, 267 N.W.2d 349 (1978) (when reports contain out-of-court assertions by others, additional level of hearsay contained in report and exception for that hearsay must also be found; reports cannot establish more than maker could if testifying in court on subject matter)

908.06 Attacking and supporting credibility of declarant.

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Judicial Council Committee's Note (1974)

This section is a possible change in Wisconsin law because it eliminates the "prior warning" as a foundation for impeachment in the case of a hearsay declaration. The need for a warning exists in some non-hearsay declarations (see comment to s. 906.13(2)) but in Wisconsin has never been expressly ruled upon in a hearsay declaration. The logic of elimination of the warning is found in the Federal Committee's comment.

Case Annotations

State v. Smith, 2005 WI App 152, ¶ 11, 284 Wis. 2d 798, 702 N.W.2d 850.

A defendant who introduces hearsay from an unavailable declarant cannot later claim that the declarant was harmed by the inability to cross-examine that declarant when the prosecution introduces prior inconsistent statements to impeach the declarant.

In this case, the defendant introduced hearsay of a declarant accepting responsibility for the crime with which the defendant was charged. This hearsay was introduced through testimony of the declarant's jailmate. The prosecutors rebutted that evidence with statements that the declarant gave to the police denying involvement in the crime. The state's introduction of the rebutting hearsay evidence was appropriate.

State v. Evans, 187 Wis. 2d 66, 78, 522 N.W.2d 554 (Ct. App. 1994).

In a criminal prosecution for the sexual assault of a child who made accusatory statements before the defendant's arrest but who did not testify at trial, the child was treated as a witness because the child was a hearsay declarant. The child's statements were open to attack pursuant to the methodology of attacking the character of a witness as set forth in Wis. Stat. §§ 904.04(1)(c) and 906.08.

State v. Rochelt, 165 Wis. 2d 373, 386–87, 477 N.W.2d 659 (Ct. App. 1991).

It was error for the trial court to admit a law enforcement officer's testimony that the defendant's co-conspirator never suggested the defendant was not involved in the crime charged. The trial court allowed this hearsay evidence after admitting two witnesses' deposition testimony that they had heard the co-conspirator say the defendant had not been involved in the crime—in both instances, on the grounds that an unspecified hearsay exception applied. The court of appeals stated that Wis. Stat. § 908.06 only allows further testimony when the credibility of the declarant in the initial hearsay testimony has been attacked. The deposed witnesses did not attack the declarant's character.

908.07 [*repealed*]

NOTE. Wis. Stat. § 908.07 was repealed eff. 4-27-12 by 2011 Wis. Act 285. Before 4-27-12, it read:

908.07 Preliminary examination; hearsay allowable. A statement which is hearsay, and which is not otherwise excluded from the hearsay rule under ss. 908.02 to 908.045, may be allowed in a preliminary examination as specified in s. 970.03(11).

Authors' Note. An exception to the hearsay rule applies to testimony received at a preliminary examination under Wis. Stat. § 970.038, *created by* 2011 Wis. Act 285. Wis. Stat. § 970.038(2) permits the court to base its finding of probable cause on hearsay alone in a felony case.

See also Wis. Stat. § 970.03(12) (permitting at preliminary examination the admittance of certified report by crime laboratory, state hygiene laboratory, FBI laboratory, hospital laboratory, or health department analyzing evidence without presence of expert who prepared report, if report is relevant).

908.08 Audiovisual recordings of statements of children.

(1) In any criminal trial or hearing, juvenile fact-finding hearing under s. 48.31 or 938.31 or revocation hearing under s. 302.113(9)(am), 302.114(9)(am), 304.06(3), or 973.10(2), the court or hearing examiner may admit into evidence the audiovisual recording of an oral statement of a child who is available to testify, as provided in this section.

(2) (a) Not less than 10 days before the trial or hearing, or such later time as the court or hearing examiner permits upon cause shown, the party offering the statement shall file with the court or hearing officer an offer of proof showing the caption of the case, the name and present age of the child who has given the statement, the date, time and place of the statement and the name and business address of the camera operator. That party shall give notice of the offer of proof to all other parties, including notice of reasonable opportunity for them to view the statement before the hearing under par. (b).

(b) Before the trial or hearing in which the statement is offered and upon notice to all parties, the court or hearing examiner shall conduct a hearing on the statement's admissibility. At or before the hearing, the court shall view the statement. At the hearing, the court or hearing examiner shall rule on objections to the statement's admissibility in whole or in part. If the trial is to be tried by a jury, the court shall enter an order for editing as provided in s. 885.44(12).

(3) The court or hearing examiner shall admit the recording upon finding all of the following:

(a) That the trial or hearing in which the recording is offered will commence:

1. Before the child's 12th birthday; or

2. Before the child's 16th birthday and the interests of justice warrant its admission under sub. (4).

(b) That the recording is accurate and free from excision, alteration and visual or audio distortion.

(c) That the child's statement was made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth.

(d) That the time, content and circumstances of the statement provide indicia of its trustworthiness.

(e) That admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet allegations made in the statement.

(4) In determining whether the interests of justice warrant the admission of an audiovisual recording of a statement of a child who is at least 12 years of age but younger than 16 years of age, among the factors which the court or hearing examiner may consider are any of the following:

(a) The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.

(b) The child's general physical and mental health.

(c) Whether the events about which the child's statement is made constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.

(d) The child's custodial situation and the attitude of other household members to the events about which the child's statement is made and to the underlying proceeding.

(e) The child's familial or emotional relationship to those involved in the underlying proceeding.

(f) The child's behavior at or reaction to previous interviews concerning the events involved.

(g) Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.

(h) Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.

(i) Whether admission of the recording would reduce the mental or emotional strain of testifying or reduce the number of times the child will be required to testify.

(5) (a) If the court or hearing examiner admits a recorded statement under this section, the party who has offered the statement into evidence may nonetheless call the child to testify immediately after the statement is shown to the trier of fact. Except as provided in par. (b), if that party does not call the child, the court or hearing examiner, upon request by any other party, shall order that the child be produced immediately following the showing of the statement to the trier of fact for cross-examination.

(am) The testimony of a child under par. (a) may be taken in accordance with s. 971.11(2m), if applicable.

(b) If a recorded statement under this section is shown at a preliminary examination under s. 970.03 and the party who offers the statement does not call the child to testify, the court may not order under par. (a) that the child be produced for cross-examination at the preliminary examination.

(6) Recorded oral statements of children under this section in the possession, custody or control of the state are discoverable under ss. 48.293(3), 304.06(3d), 971.23(1)(e) and 973.10(2g).

(7) At a trial or hearing under sub. (1), a court or a hearing examiner may also admit into evidence an audiovisual recording of an oral statement of a child that is hearsay and is admissible under this chapter as an exception to the hearsay rule.

Judicial Council Note (1985)

[See the legislative purpose clause in section 1 of 1985 Wis. Act 262.]

Subsection (1) limits this hearsay exception to criminal trials and hearings in criminal, juvenile and probation or parole revocation cases at which the child is available to testify. Other exceptions may apply when the child is unavailable. See ss. 908.04 and 908.045, Stats. Subsection (5) allows the proponent to call the child to testify and other parties to have the child called for cross-examination. The right of a criminal defendant to cross-examine the declarant at the trial or hearing in which the statement is admitted satisfies constitutional confrontation requirements. *California v. Green*, 399 U.S. 149, 166 and 167 (1970); *State v. Burns*, 112 Wis. 2d 131, 144, 332 N.W.2d 757 (1983). A defendant who exercises this right is not precluded from calling the child as a defense witness.

Subsection (2) requires a pretrial offer of proof and a hearing at which the court or hearing examiner must rule upon objections to the admissibility of the statement in whole or in part. These objections may be based upon evidentiary grounds or upon the requirements of sub. (3). If the trial is to be a jury, the videotape must be edited under one of the alternatives provided in s. 885.44(12), Stats.

Subsection (3)(a) limits the applicability of this hearsay exception to trials and hearings which commence prior to the child's 16th birthday. If the trial or hearing commences after the child's 12th birthday, the court or hearing examiner must also find that the interests of justice warrant admission of the statement. A nonexhaustive list of factors to be considered in making this determination is provided in sub. (4).

Subsection (6) refers to the statutes making videotaped oral statements of children discoverable prior to trial or hearing.

Authors' Note. Wis. Stat. § 908.08 permits the admission of audiovisually recorded oral statements of children under certain conditions and when the child is *available*.

But see Wis. Stat. § 967.04(7)–(10) for the requirements and procedure to be used in recording the trial deposition of a child by audiovisual means. Wis. Stat. § 967.04(9) permits such depositions to be used in criminal prosecutions and juvenile fact-finding hearings under Wis. Stat. §§ 48.31 and 938.31, without the additional hearing required by this section. Wis. Stat. § 967.04(10) provides that if an audiovisually recorded deposition is admitted, the child cannot be called as a witness unless necessary in the interest of fairness.

Case Annotations

State v. Marks, 2022 WI App 20, ¶¶ 21–27, 402 Wis. 2d 285, 975 N.W.2d 238 (review denied)**.**

In a prosecution for sexual assault, the trial court properly permitted evidence of an audiovisual recording introduced by the state that had been created through merging a separate audio recording with a video recording to produce a final audiovisual recording of an interview between a four-year-old victim and her social worker. The framework under Wis. Stat. § 908.08(3)(b) considers whether the manipulation of the recording affected the accuracy or completeness of the evidence. The merged audiovisual recording was done in a manner to produce a final recording with clear, continuous sound, and did not run afoul of the requirements of Wis. Stat. § 908.08(3)(b).

State v. Mercado, 2021 WI 2, ¶¶ 46–50, 53, 55, 395 Wis. 2d 296, 953 N.W.2d 337.

Wis. Stat. § 908.02(2)(b) requires the trial court to exercise its discretion to determine how much of a child's video-recorded statement it must review to make the findings required by Wis. Stat. § 908.08(3). The supreme court declined to adopt a bright-line rule that the trial court must view the recording in its entirety.

Wis. Stat. § 908.08(5) does not preclude the trial court from allowing a child to testify in court before the child's video-recorded statement is shown to the jury. The supreme court expressly disavowed any interpretation of *State v. James*, 2005 WI App 188, 285 Wis. 2d 783, 703 N.W.2d 727, to the contrary.

The admissibility of a child's video-recorded statement under Wis. Stat. § 908.08(7) is not limited by the requirements of Wis. Stat. § 908.08(2) and (3). A video-recorded statement that is hearsay can be admitted as an exception to the hearsay rule.

State v. Lopez, 2014 WI 11, ¶¶ 86–88, 353 Wis. 2d 1, 843 N.W.2d 390.

A defendant pleaded no contest to six counts of physical abuse of a child after the court ordered audiovisually recorded statements of the victim admissible under Wis. Stat. § 908.08. Approximately six months later, when the child turned 16 years old, the defendant attempted to withdraw the no-contest plea. The court found that the state's inability to use the audiovisual recordings of the victim's interviews under Wis. Stat. § 908.08—because the child was no longer less than 16 years old—would have resulted in substantial prejudice to the state. The substantial prejudice resulted from the state's inability to admit significant, persuasive, and compelling evidence that would have been admissible under Wis. Stat. § 908.08 if a trial had taken place before the victim attained 16 years of age. Therefore, the circuit court properly denied the defendant's request to withdraw the no-contest plea.

State v. Marinez, 2010 WI App 34, ¶¶ 12–20, 324 Wis. 2d 282, 781 N.W.2d 511.

Wis. Stat. § 908.08 does not preclude playing a previously admitted child's video statement during closing argument.

State v. Snider, 2003 WI App 172, ¶¶ 8–19, 266 Wis. 2d 830, 668 N.W.2d 784.

In a prosecution for sexual assault, the trial court did not erroneously exercise its discretion by admitting a child victim's videotaped statement that did not meet the requirements of Wis. Stat. § 908.08(2) and (3). Wis. Stat. § 908.08 does not preclude the admission of videotaped statements of children via other hearsay exceptions. Thus, if a child's videotaped statement is admissible under one of the hearsay exceptions, the requirements of Wis. Stat. § 908.08(2) and (3) need not be met.

State v. Jimmie R.R., 2000 WI App 5, ¶¶ 37–45, 232 Wis. 2d 138, 606 N.W.2d 196.

In evaluating whether a videotaped interview may be admitted into evidence under Wis. Stat. § 908.08(3)(c), the statutory provisions of "the importance of telling the truth" and "that false statements are punishable" are interrelated. It is sufficient that the child-witness express an understanding of the importance of truth-telling, since most reasonable children will associate a warning about the importance of telling the truth with the related concept of untruthfulness and the consequences that might flow from deceit. However, the interview process must demonstrate that the child has been adequately advised of the importance of telling the truth to satisfy the "punishment" prong when that prong has not been expressly discussed on tape.

State v. Tarantino, 157 Wis. 2d 199, 208–09, 458 N.W.2d 582 (Ct. App. 1990).

Videotaped testimony from a preliminary hearing is admissible as an oral statement under Wis. Stat. § 908.08. Videotaped statements are no different than any other oral statement. Questions as to their reliability are rebutted by the fact that preliminary hearing statements are "given under oath or other circumstances which impress upon the child witness the importance of being truthful." This section requires that the child be available for cross-examination if requested by the defendant.

Chapter 29
Requirements

909.01 General provision.

The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Judicial Council Committee's Note (1974)

Authentication or identification is a special aspect of relevancy. It is preliminary and precedent to a question of admissibility. The latter determination is made upon the entirety of these rules of evidence. Thus for the determination of admissibility of (for example) a contract its relevancy must be established under ch. 904 but its authenticity must be established under s. 909.01. Whether the requirement of authentication or identification has been met by the proponent of evidence is determined by the judge in a manner akin to, but not identical with, s. 901.04(2). McCormick, section 194, points up the difference:

> It must be noticed, however, that authenticity is not to be classed as one of those preliminary questions of fact conditioning admissibility under technical rules of competency or privilege. As to these latter, the trial judge will permit the adversary to introduce controverting proof on the preliminary issue in support of his objection, and the judge will decide this issue, without submission to the jury, as a basis for his ruling on admissibility. On the other hand, the authenticity of a writing or statement is not a question of the application of a technical rule of evidence. It goes to genuineness and relevance, as the jury can

readily understand, and if a prima facie showing is made, the writing or statement comes in, with no opportunity then for evidence in denial. If evidence disputing genuineness is later given, the issue is for the jury.

Authentication is not equivalent to establishing that the contract is in fact genuine. Authentication is complete when some witness says it is genuine under s. 909.015(1) or it is authenticated under some other provision of ch. 909. To have the judge determine that the contract was genuine would narrow the broad definition of relevancy and reserve to the judicial function the determinations of fact that are properly those of the trier of the fact. On the other hand the contract has no relevancy and the jury's time should not be wasted with the offer into evidence which is irrelevant unless a claim of genuineness or authenticity is made. See Federal Advisory Committee comment to s. 901.04(2).

Authentication or identification is part of the process called "laying a foundation." Ladd, *Objections, Motions and Foundation Testimony*, 43 Cornell Law Q. 543 (1957–58). However, compliance with the requirements of authentication or identification will not necessarily fulfill the burden of all the foundation testimony needed. Authentication of a copy may not fulfill the burden of producing the original writing (ss. 910.02 to 910.04); nor other conditions of trustworthiness under the hearsay rules; nor alleviate the need that the documentary data be of a type reasonably relied upon by experts in the particular field (s. 907.03); nor abrogate a privilege (ch. 905) or the need of a witness for firsthand knowledge (s. 906.02). Thus authentication or identification will not of itself determine all of the questions of admissibility.

Case Annotations

Gaethke v. Pozder, 2017 WI App 38, ¶¶ 27–28, 376 Wis. 2d 448, 899 N.W.2d 381.

A plaintiff in an injury case can testify regarding the authenticity of medical bills in relation to the plaintiff's injury.

State v. Giacomantonio, 2016 WI App 62, ¶ 25, 371 Wis. 2d 452, 885 N.W.2d 394.

The authentication rule merely requires a threshold of proof sufficient to support a finding that the matter in question is what its proponent claims. Whether the matter in question is what the proponent claims is subject to challenge once admitted. Text messages do not warrant different or more stringent authentication rules than those that are used to authenticate other sorts of correspondence.

Dow Fam., LLC v. PHH Mortg. Corp., 2013 WI App 114, ¶¶ 15–24, 350 Wis. 2d 411, 838 N.W.2d 119, *aff'd on other grounds*, 2014 WI 56, ¶ 10 n.3, 354 Wis. 2d 796, 848 N.W.2d 728.

An alleged mortgage holder (defendant) submitted a copy of a promissory note on summary judgment in a foreclosure action. The defendant's attorney testified in an affidavit that the attorney's office received "what *appear[ed]* to be the original note and mortgage." Additionally, the defendant's records custodian testified that he was the custodian of business records and had personal knowledge of how these records were created and maintained and that the defendant was the current holder of the note. The records custodian did not testify that the defendant was in possession of the original note or that the copy of the note was a true and accurate copy. This was not enough to authenticate the note, as required by Wis. Stat. § 909.01.

State v. Deadwiller, 2012 WI App 89, ¶ 13, 343 Wis. 2d 703, 820 N.W.2d 149, *aff'd on other grounds*, 2013 WI 75, 350 Wis. 2d 138, 834 N.W.2d 362.

A proponent of evidence establishes its authenticity by showing it is improbable that the original item has been exchanged, contaminated, or tampered with.

Horak v. Building Servs. Indus. Sales Co., 2012 WI App 54, 341 Wis. 2d 403, 815 N.W.2d 400.

Invoices showing that a defendant-supplier sold asbestos products to a business while that business's now deceased employee worked there were admissible under Wis. Stat. § 909.01. The documents were more than 20 years old, and their authenticity was adequately established under Wis. Stat. § 909.015(8) despite no proof of chain of custody or witness verification of authenticity. The location of the invoices before production (in the defendant's attorney's office because of use in prior litigation) and their condition created no suspicion to suggest that they were inauthentic.

State v. Denton, 2009 WI App 78, ¶¶ 17–19, 319 Wis. 2d 718, 768 N.W.2d 250.

While demonstrative computer-generated animations are permissible to clarify lay witness testimony, the lay witness must authenticate that the animation fairly and accurately depicts the lay witness's testimony.

State v. McCoy, 2007 WI App 15, ¶ 19, 298 Wis. 2d 523, 728 N.W.2d 54.

For evidence controlled by public officers to satisfy the requirement that the evidence in question "is what its proponent claims," the government need only show that reasonable precautions were taken to preserve the evidence. The government need not exclude all possibilities of tampering. A presumption of regularity exists with respect to official acts of public officers. Absent any evidence to the contrary, the court presumes that their official duties have been discharged properly. Any gaps in the chain of evidence go to the weight of the evidence rather than its admissibility.

State v. Smith, 2005 WI 104, ¶¶ 29–33, 283 Wis. 2d 57, 699 N.W.2d 508.

The authentication provisions of 28 U.S.C. § 1738, relating to the admissibility of records and judicial proceedings from another state, need not be met for a Wisconsin court to admit into evidence a copy of a certified copy of a Maine court's child support order.

State v. Peterson, 222 Wis. 2d 449, 455–57, 588 N.W.2d 84 (Ct. App. 1998).

The fundamental requirements for the admission of video images are the same as for still photographs. The videographer's testimony that the videotape fairly and accurately portrays what the videographer saw is sufficient.

Nischke v. Farmers & Merchants Bank & Tr., 187 Wis. 2d 96, 107, 522 N.W.2d 542 (Ct. App. 1994).

Alleged statements of self-identification cannot themselves be used to authenticate the identity of a speaker in a telephone conversation. Thus, a party's testimony that statements were made to the party in a phone call by a bank employee were not admissible because the statements were not sufficiently authenticated when additional evidence was not advanced to support the claim that the caller was an employee.

Lievrouw v. Roth, 157 Wis. 2d 332, 354, 459 N.W.2d 850 (Ct. App. 1990).

The Wisconsin Motorist Handbook is a self-authenticating publication under Wis. Stat. § 909.02(5). Therefore, no additional evidence is necessary "to support a finding that the matter in question is what its proponent claims" under Wis. Stat. § 909.01.

B.A.C. v. T.L.G. (In re Paternity of J.S.C.), 135 Wis. 2d 280, 289–90, 400 N.W.2d 48 (Ct. App. 1986).

The concept of "chain of custody" is covered by the rules of authentication. A chain of custody must be established before expert testimony as to blood tests, the reports of blood tests, or the samples themselves can be admitted as relevant evidence. In other words, they must be authenticated. The degree of proof necessary to establish the chain of custody is a matter within the trial court's discretion. The testimony must be sufficiently complete so as to render it *improbable* that the original item has been exchanged, contaminated, or tampered with.

City of New Berlin v. Wertz, 105 Wis. 2d 670, 676, 314 N.W.2d 911 (Ct. App. 1981).

The question of authenticity is preliminary to the question of admissibility. Authenticity is satisfied if the proponent of evidence shows sufficient proof to the court to support a finding by the court "that the matter in question is what its proponent claims."

See also ....

R.S. v. Milwaukee Cnty. (In re Guardianship of R.S.), 154 Wis. 2d 706, 714, 454 N.W.2d 1 (Ct. App. 1990) (rule simply requires that before something can be received into evidence, it must be what it purports to be), *rev'd on other grounds*, 162 Wis. 2d 197, 470 N.W.2d 260 (1991).

909.015 General provision; illustrations.

By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of s. 909.01:

(1) TESTIMONY OF WITNESS WITH KNOWLEDGE. Testimony of a witness with knowledge that a matter is what it is claimed to be.

(2) NONEXPERT OPINION ON HANDWRITING. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) COMPARISON BY TRIER OF FACT OR EXPERT WITNESS. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) DISTINCTIVE CHARACTERISTICS AND THE LIKE. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) VOICE IDENTIFICATION. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) TELEPHONE CONVERSATIONS. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telecommunications company to a particular person or business, if:

(a) In the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

(b) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) PUBLIC RECORDS OR REPORTS. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) ANCIENT DOCUMENTS OR DATA COMPILATIONS. Evidence that a document or data compilation, in any form:

(a) Is in a condition that creates no suspicion concerning its authenticity;

(b) Was in a place where it, if authentic, would likely be; and

(c) Has been in existence 20 years or more at the time it is offered.

(9) PROCESS OR SYSTEM. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) METHODS PROVIDED BY STATUTE OR RULE. Any method of authentication or identification provided by statute or by other rules adopted by the supreme court.

Judicial Council Committee's Note (1974)

Example 1. Wisconsin is in accord. *Grunwald v. Halron*, 33 Wis. 2d 433, 441, 147 N.W.2d 543, 548–49 (1967); *Shaw v. Wuttke*, 28 Wis. 2d 448, 456–58, 137 N.W.2d 649, 653–54 (1965); *Mixis v. Wisconsin Pub. Serv. Comm'n*, 26 Wis. 2d 488, 503–04, 132 N.W.2d 769, 776 (1965); *Lubner v. Peerless Ins. Co.*, 19 Wis. 2d 364, 371, 120 N.W.2d 54, 57–58 (1963); *State v. Germana*, 228 Wis. 368, 371–72, 280 N.W. 375, 377 (1938); *Benson v. Superior Mfg. Co.*, 147 Wis. 20, 25–26, 132 N.W. 633, 635 (1911); *Bright v. Carter*, 117 Wis. 631, 633–34, 94 N.W. 645, 646 (1903); *Rhyner v. City of Menasha*, 107 Wis. 201, 213, 83 N.W. 303, 307 (1900). The alteration to the federal rule is for clarity and is not intended to change substance.

Example 2. Wisconsin is in accord. *Sawyer v. Choate*, 92 Wis. 533, 536, 66 N.W. 689, 690 (1896); *Daniels v. Foster*, 26 Wis. 686 (1870).

Example 3. This rule modifies the higher standard of comparison formerly found in s. 889.26, which is repealed. Compare, however, *Estate of Staniszewski*, 28 Wis. 2d 403, 137 N.W.2d 57 (1965).

Example 4. Wisconsin is in accord. *State v. Hancock*, 48 Wis. 2d 687, 180 N.W.2d 517 (1970); *State v. McCarty*, 47 Wis. 2d 781, 785–86, 177 N.W.2d 819, 821–22 (1970); *Hundhauser v. State*, 44 Wis. 2d 447, 171 N.W.2d 397 (1969); *Ferguson v. State*, 41 Wis. 2d 588, 164 N.W.2d 492 (1969); *State v. Dunn*, 10 Wis. 2d 447, 464, 103 N.W.2d 36, 44 (1960); *Magnuson v. State*, 187 Wis. 122, 203 N.W. 749 (1925); *Knoll v. State*, 55 Wis. 249, 252, 12 N.W. 369 (1882).

Example 5. Wisconsin is in accord. *Paulson v. Scott*, 260 Wis. 141, 50 N.W.2d 376, 31 A.L.R.2d 706 (1951); *see also State ex rel. Arnold v. County Court of Rock County*, 51 Wis. 2d 434, 187 N.W.2d 354 (1971), and ss. 885.36 and 968.27–32.

Example 6. Wisconsin is in accord. *Gilbert v. United States Fire Ins. Co.*, 49 Wis. 2d 193, 181 N.W.2d 527 (1970); *Paulson v. Scott*, 260 Wis. 141, 50 N.W.2d 376, 31 A.L.R.2d 706 (1951); *Kiviniemi v. American Mut. Liab. Ins. Co.*, 201 Wis. 619, 231 N.W. 252 (1930).

Example 7. The Wisconsin cases are consistent with this rule. *Estate of Schubert*, 9 Wis. 2d 236, 101 N.W.2d 95 (1960); *Dickinson v. Smith*, 134 Wis. 6, 114 N.W. 133 (1907); *Fowler v. Schafer*, 69 Wis. 23, 32 N.W. 292 (1887); *Goodhue v. Grant*, 1 Pin. 556 (1845).

Example 8. This rule is consistent with Wisconsin cases. However, the more recent Wisconsin cases deal with the subject of admissibility as an exception to the hearsay rule. [See s. 908.03(16)]. The Wisconsin rule of 30 years is reduced to 20 years. *Muehrcke v. Behrens*, 43 Wis. 2d 1, 169 N.W.2d 86 (1969); *Jefferson v. Eiffler*, 16 Wis. 2d 123, 113 N.W.2d 834 (1962); *Barrows v. Kenosha County*, 8 Wis. 2d 58, 98 N.W.2d 461 (1959); *Dickinson v. Smith*, 134 Wis. 6, 114 N.W. 133 (1907); *Fowler v. Scott*, 64 Wis. 509, 25 N.W. 716 (1885).

Example 9. See Wigmore sections 665, 665(a), 795, and 795(a). Cf. *Estate of Schubert*, 9 Wis. 2d 236, 101 N.W.2d 95 (1960), and *Lewandowski v. Preferred Risk Mut. Ins. Co.*, 33 Wis. 2d 69, 146 N.W.2d 505 (1966).

Example 10. This provision permits the survival of other statutory and rule methods of authentication.

Authors' Note. Wis. Stat. § 16.61(7) provides a method of certifying and authenticating a microfilm copy of a state record that has been destroyed. Wis. Stat. § 16.61(8) provides that a microfilm reproduction meeting the standards of that section is admissible if the original would have been.

Wis. Stat. § 228.03 applies the standards under Wis. Stat. § 16.61(7) as to the admission of copies of county records from counties having a population of 750,000 or more.

Wis. Stat. § 889.29 permits the admission of photographic or similar copies of records kept in the regular course of business, whether or not the original is still in existence, provided the reproduction is satisfactorily identified. An enlargement of the reproduction is also admissible. No such record is inadmissible solely because it is in an electronic format.

Case Annotations

(1) Testimony of Witness with Knowledge

Dow Fam., LLC v. PHH Mortg. Corp., 2013 WI App 114, ¶¶ 15–24, 350 Wis. 2d 411, 838 N.W.2d 119, *aff'd on other grounds*, 2014 WI 56, ¶ 10 n.3, 354 Wis. 2d 796, 848 N.W.2d 728.

An alleged mortgage holder (defendant) submitted a copy of a promissory note on summary judgment in a foreclosure action. The defendant's attorney testified in an affidavit that they attorney's office received "what *appear[ed]* to be the original note and mortgage." Additionally, the defendant's records custodian testified that he was the custodian of business records and had personal knowledge of how these records were created and maintained and that the defendant was the current holder of the note. The records custodian did not testify that the defendant was in possession of the original note or that the copy of the note was a true and accurate copy. This was not enough to authenticate the note, as required by Wis. Stat. § 909.01.

State v. Peterson, 222 Wis. 2d 449, 455–57, 588 N.W.2d 84 (Ct. App. 1998).

The fundamental requirements for the admission of video images are the same as for still photographs. The videographer's testimony that the videotape fairly and accurately portrays what the videographer saw is sufficient.

Schulz v. St. Mary's Hosp., 81 Wis. 2d 638, 648–49, 260 N.W.2d 783 (1978).

A doctor is qualified to identify hospital records that have not been filed with the court pursuant to Wis. Stat. § 908.03(6m)(a).

(2) Nonexpert Opinion on Handwriting

(3) Comparison by Trier of Fact or Expert Witness

Deutsche Bank Nat'l Tr. Co. v. Wuensch, 2018 WI 35, ¶ 31, 380 Wis. 2d 727, 911 N.W.2d 1.

A copy of an original promissory note was properly admitted as evidence in a bench trial based on the court's comparison of the copy to the self-authenticated original.

(4) Distinctive Characteristics and the Like

Gaethke v. Pozder, 2017 WI App 38, ¶ 28, 376 Wis. 2d 448, 899 N.W.2d 381.

Identifying characteristics of medical bills that allow a plaintiff in an injury case to authenticate whether medical bills relate to the plaintiff's injury include

1. The identity of the health-care provider;
2. The identity of the witness;
3. The date of treatment; and
4. The description of the care.

State v. Giacomantonio, 2016 WI App 62, ¶¶ 19–24, 371 Wis. 2d 452, 885 N.W.2d 394.

Authentication of electronic communications can be done through circumstantial evidence—in this instance, by identifying the author of text messages by their associated phone number, their content, and their timing.

R.S. v. Milwaukee Cnty. (In re Guardianship of R.S.), 154 Wis. 2d 706, 716, 454 N.W.2d 1 (Ct. App. 1990), *rev'd on other grounds*, 162 Wis. 2d 197, 470 N.W.2d 260 (1991).

A doctor's report was authenticated when the report bore the doctor's letterhead and handwritten signature, discussed the ward's examination, and noted who requested the examination.

(5) Voice Identification

State v. Baldwin, 2010 WI App 162, ¶¶ 52–58, 330 Wis. 2d 500, 794 N.W.2d 769.

The state's witnesses sufficiently identified the missing witness's voice in telephone call recordings and linked the calls to the defendant's jail location to establish foundation for the admission of the recordings.

State v. Sarinske, 91 Wis. 2d 14, 45, 280 N.W.2d 725 (1979), *overruled on other grounds by State v. Wayerski*, 2019 WI 11, 385 Wis. 2d 344, 922 N.W.2d 468.

A witness's statement that the witness recognized the defendant's voice over the phone, coupled with the witness's testimony relating to several previous conversations with the defendant, supplied the necessary foundation for the admissibility of the witness's identification of the defendant.

(6) Telephone Conversations

(7) Public Records or Reports

State v. Smith, 2005 WI 104, ¶¶ 31–32, 283 Wis. 2d 57, 699 N.W.2d 508.

In a criminal proceeding for failure to pay child support, evidence of a copy of a certified copy of another state's child support order was properly authenticated by testimony of an employee of the clerk of circuit court's office that the copy of the certified copy of the other state's order was identical to the original certified copy (with raised seal) kept in the circuit court's file.

(8) Ancient Documents or Data Compilations

Wosinski v. Advance Cast Stone Co., 2017 WI App 51, ¶¶ 64, 68, 377 Wis. 2d 596, 901 N.W.2d 797.

The admissibility of architectural drawings in the possession of Milwaukee County, the owner of the construction project at issue in this case, were challenged regarding authenticity. The first requirement for authentication of an ancient document is that it be in a condition that creates no suspicion concerning its authenticity. That requirement is satisfied by evidence sufficient to support a finding that the document in question is what its proponent claims. Arguments related to who had submitted the drawings were a weight and credibility issue for the jury and not an issue of admissibility.

Horak v. Building Servs. Indus. Sales Co., 2012 WI App 54, ¶¶ 8–16, 341 Wis. 2d 403, 815 N.W.2d 400.

Invoices showing that a defendant-supplier sold asbestos products to a business while that business's now deceased employee worked there were admissible as ancient documents. The invoices' authenticity was adequately established under Wis. Stat. § 909.015(8), despite no proof of chain of custody or witness verification of authenticity, because (1) their condition created no suspicion to suggest that they were inauthentic; (2) they were in a place where, if authentic, they would likely be (in the defendant's attorney's office because of use in prior litigation); and (3) they were more than 20 years old.

(9) Process or System

State v. Kandutsch, 2011 WI 78, ¶¶ 19, 41–50, 336 Wis. 2d 478, 799 N.W.2d 865.

A court should not afford a presumption of accuracy to an electronic monitoring device and its computer-generated report until the proponent has put forth evidence regarding the installation of the device and testimony regarding its accuracy and reliability by a person familiar with its operation.

(10) Methods Provided by Statute or Rule

909.02 Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to any of the following:

(1) PUBLIC DOCUMENTS UNDER SEAL. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer or agency thereof, and a signature purporting to be an attestation or execution.

(2) PUBLIC DOCUMENTS NOT UNDER THE SEAL. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in sub. (1), having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) PUBLIC DOCUMENTS OF FOREIGN COUNTRIES. A document purporting to be executed or attested in his or her official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position of the executing or attesting person, or of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the judge may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) CERTIFIED COPIES OF PUBLIC RECORDS. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with sub. (1), (2) or (3) or complying with any statute or rule adopted by the supreme court, or, with respect to records maintained by the department of transportation under s. 110.20 or chs. 194, 218, 341 to 343, 345, or 348, certified electronically in any manner determined by the department of transportation to conform with the requirements of s. 909.01.

(5) OFFICIAL PUBLICATIONS. Books, pamphlets or other publications purporting to be issued by public authority.

(6) NEWSPAPERS AND PERIODICALS. Printed materials purporting to be newspapers or periodicals.

(7) TRADE INSCRIPTIONS AND THE LIKE. Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.

(8) ACKNOWLEDGED AND AUTHENTICATED DOCUMENTS. Documents accompanied by a certificate of acknowledgment under the hand and seal or rubber stamp of a notary public or other person authorized by law to take acknowledgments or any public officer entitled by virtue of public office to administer oaths or authenticated or acknowledged as otherwise authorized by statute.

(9) COMMERCIAL PAPER AND RELATED DOCUMENTS. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by chs. 401 to 411.

(10) STATUTORY RULES. Any signature, document or other matter declared by statute to be presumptively or prima facie genuine or authentic.

(11) PATIENT HEALTH CARE RECORDS. Records served upon or made available to all parties under s. 908.03(6m).

(12) CERTIFIED DOMESTIC RECORDS OF REGULARLY CONDUCTED ACTIVITY. (a) The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under s. 908.03(6) if accompanied by a written certification of its custodian or other qualified person, in a manner complying with any statute or rule adopted by the supreme court, certifying all of the following:

1. That the record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.

2. That the record was kept in the course of the regularly conducted activity.

3. That the record was made of the regularly conducted activity as a regular practice.

(b) A party intending to offer a record into evidence under par. (a) must provide written notice of that intention to all adverse parties and must make the record and certification available for inspection sufficiently in advance of the offer of the record and

certification into evidence to provide an adverse party with a fair opportunity to challenge the record and certification.

(13) CERTIFIED FOREIGN RECORDS OF REGULARLY CONDUCTED ACTIVITY. (a) The original or a duplicate of a foreign record of regularly conducted activity that would be admissible under s. 908.03(6) if accompanied by a written declaration by its custodian or other qualified person certifying all of the following:

1. That the record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.

2. That the record was kept in the course of the regularly conducted activity.

3. That the record was made of the regularly conducted activity as a regular practice.

(b) The declaration under par. (a) must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under par. (a) must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of the offer of the record and declaration into evidence to provide an adverse party with a fair opportunity to challenge the record and declaration.

Judicial Council Committee's Note (1974)

Sub. (1). This subsection is consistent with present case law and statutes. There are statutes which allow a specific public document under seal to be self-authenticated. This subsection would extend self-authentication to those public documents under seal which are not treated by a separate statute.

Sub. (2). This subsection is consistent with present case law and statutes. There are statutes which allow a specific public document not under seal to be self-authenticated. This subsection would extend self-authentication to those public documents not under seal which are not treated by a specific statute.

Sub. (3). This subsection provides for a more extensive manner of certification than s. 891.09(3) which is amended to conform with this subsection.

> Official certificates of births, marriages or deaths, issued in foreign countries in which such births, marriages or deaths have occurred, purporting to be founded on books of record, properly authenticated, shall be received as presumptive evidence of the facts in such certificates stated.

Sub. (4). The manner of certification provided in this subsection is different from that provided for in s. 889.08; however, there is no need to amend s. 889.08. Public records not specifically treated by a present statute would be entitled to self-authentication under this subsection.

Sub. (5). This subsection is in accord with ss. 889.01, 889.02, and 889.04, and *Quint v. Merrill*, 105 Wis. 406, 81 N.W. 664 (1900). However, *Creamery Package Mfg. Co. v. Industrial Commission*, 211 Wis. 326, 248 N.W. 140 (1933), apparently overlooked the foregoing provisions of the statutes and relied upon s. 889.18, and its holding is contrary to the older case.

Sub. (6). This subsection would apparently be new in Wisconsin. However, it is consistent with ss. 889.01, 889.02 and 889.04, and consistent with an indirectly related s. 402.724 which authorizes the admissibility of market quotations from newspapers, periodicals and trade journals.

Sub. (7). There are no Wisconsin cases that have expressed opinions comparable to this subsection. A parallel may be drawn in *Kruse v. Weigand*, 204 Wis. 195, 235 N.W. 426 (1931), followed in 204 Wis. 206, 235 N.W. 431; *Smith v. Weigand*, 204 Wis. 207, 235 N.W. 431; *Smith v. Weigand*, 204 Wis. 208, 235 N.W. 431, two cases, and *Woodward v. Weigand*, 204 Wis. 209, 235 N.W. 432, where the court said:

> "It is, of course, the law that a car bearing certain license numbers is presumed to be owned by the person to whom the license number is issued, and to be driven by the owner thereof or his servant."

Sub. (8). This subsection is consistent with ss. 706.06, 706.065, 806.067 and 889.23 even though the latter provides that an acknowledged instrument "shall be competent evidence" and the Wisconsin Supreme Court has held that the acknowledgment satisfies only the authentication requirement and is not a hearsay exception. *Whalen v. State Farm Mut. Auto. Ins. Co.*, 51 Wis. 2d 635, 187 N.W.2d 820 (1971).

Sub. (9). This subsection is consistent with ss. 401.202, 403.307, 403.509, 403.510 and 891.25 and Title XL.

Sub. (10). All existing statutes which provide that a document or act is genuine or authentic are retained. A partial list of such statutes follows:

52.36 Support of dependents
180.47 Effect of issuance of certificate of incorporation
708.07 Satisfaction of state mortgages
885.23 Blood tests in civil actions
885.235 Chemical tests for intoxication
889.03 Copies certified by state librarian
889.04 County and municipal ordinances
889.07 Court records and copies
889.09 Certification of nonfiling
891.03 List of State Lands
891.04 Certificate as to Public Lands
891.18 Affidavits of Service
891.21 Affidavit of notice of corporate meeting
891.22 Certificate of insurance assessment
891.23 Copies of insurance books
891.24 Evidence from bank books
891.27 Effect of seal
891.29 Allegations of copartnership
891.30 Joint liability
891.31 Corporate existence
891.32 Allegation as to executor, guardian, etc.
891.345 Establishment of citizenship
891.35 Execution of official bond
891.36 Evidence of title to realty
891.37 Presumption as to officer's return
891.38 Officer's certificate as evidence
891.39 Presumption of legitimacy; self-incrimination; birth certificates
891.395 Presumption as to time of conception
891.44 Presumption of lack of contributory negligence for infant minor
891.45 Presumption of employment-connected disease

Case Annotations

(1) Public Documents Under Seal

Nelson v. Zeimetz, 150 Wis. 2d 785, 799, 442 N.W.2d 530 (Ct. App. 1989).
For a document to be under seal, the seal must either appear on the document itself or be on a separate document that certifies under seal the authenticity of the first document.

State v. Leis, 134 Wis. 2d 441, 445–46, 397 N.W.2d 498 (Ct. App. 1986).
A driving record certified under the seal of the Wisconsin Department of Transportation and the facsimile signature of the administrator of the Division of Motor Vehicles attesting to the record's authenticity is self-authenticating and admissible. It is not necessary that each page contain a seal nor that it be certified in accordance with Wis. Stat. § 889.08(1).

(2) Public Documents Not Under the Seal

(3) Public Documents of Foreign Countries

(4) Certified Copies of Public Records

State v. Leis, 134 Wis. 2d 441, 445, 397 N.W.2d 498 (Ct. App. 1986).
Extrinsic evidence of authenticity is not required as a precondition to admissibility when a public document is certified.

See also ....

State v. Smith, 2004 WI App 116, ¶¶ 23–30, 275 Wis. 2d 204, 685 N.W.2d 821 (holding that admissibility of copies of records from out-of-state proceedings was controlled by Wis. Stat. § 889.15, not Wis. Stat. § 909.02), *rev'd*, 2005 WI 104, 283 Wis. 2d 57, 699 N.W.2d 508.

(5) Official Publications

Lievrouw v. Roth, 157 Wis. 2d 332, 354, 459 N.W.2d 850 (Ct. App. 1990).
The Wisconsin Motorist Handbook is an official publication on its face.

Liles v. Employers Mut. Ins., 126 Wis. 2d 492, 505, 377 N.W.2d 214 (Ct. App. 1985).
A pamphlet, book, or other state publication need not be issued by the state of Wisconsin or the United States to be self-authenticating. The publication of any public authority in any state is self-authenticating.

Authors' Note. In *Liles*, the court of appeals seemed to hold that if a publication is self-authenticating it is ipso facto admissible. Every publication is hearsay if offered for the truth of the matter asserted; therefore, even if authenticated (meaning it is what it purports to be), the publication must still meet one of the hearsay exceptions, as well as pass the relevance test.

(6) Newspapers and Periodicals

(7) Trade Inscriptions and the Like

(8) Acknowledged and Authenticated Documents

(9) Commercial Paper and Related Documents

Deutsche Bank Nat'l Tr. Co. v. Wuensch, 2018 WI 35, ¶ 31, 380 Wis. 2d 727, 911 N.W.2d 1.
Commercial papers are self-authenticating under Wis. Stat. chs. 401–411.

(10) Statutory Rules

(11) Patient Health Care Records

Hagenkord v. State, 100 Wis. 2d 452, 460, 302 N.W.2d 421 (1981).
Hospital records introduced in compliance with Wis. Stat. § 908.03(6m) are self-authenticating.

909.03 Subscribing witness' testimony unnecessary.
The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

Judicial Council Committee's Note (1974)

This subsection embodies the substance of the second sentence of s. 889.23. The wording of s. 889.23 might be changed from "attesting" to "subscribing" to conform with s. 909.03. S. 909.03 rejects the common law rule of very early Wisconsin cases. *Silverman v. Blake*, 17 Wis. 213 (1863); *Carrington v. Eastman*, 1 Pin. 650 (1846); *Garrison v. Owens*, 1 Pin. 544 (1845).

Chapter 30
Definitions

910.01 Definitions.
For purposes of this chapter the following definitions are applicable.

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation or recording.

(2) Photographs. "Photographs" include still photographs, X-ray films, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

Judicial Council Committee's Note (1974)

Sub. (1). Wisconsin cases have not had the occasion to expand the "original writings rule" beyond documentary evidence of words and figures to photographic process and data compilations, although s. 889.29 has made certain photographic copies admissible without need for the production of the original.

Sub. (3). The first sentence of this subsection is consistent with *State v. Klein*, 25 Wis. 2d 394, 130 N.W.2d 816 (1964), and *Wyman v. Utech*, 256 Wis. 234, 40 N.W.2d 378, mandate withdrawn 256 Wis. 234, 42N.W.2d 603 (1949). The expanded concept of the remainder of the subsection has not been decided in Wisconsin.

Sub. (4). S. 889.29, within its terms, is consistent with this rule. Beyond the application of the statute, decision of the matter has been expressly withheld, *State v. Klein*, 25 Wis. 2d 394, 130 N.W.2d 816 (1964).

Authors' Note. Wis. Stat. § 16.61(7) provides a method of certifying and authenticating a microfilm copy of a state record that has been destroyed. Wis. Stat. § 16.61(8) provides that a microfilm reproduction meeting the standards of that section is admissible, if the original would have been.

Wis. Stat. § 228.03 applies the Wis. Stat. § 16.61(7) standard as to the admission of copies of county records from counties having a population of 750,000 or more.

Wis. Stat. § 889.29 permits the admission of photographic or similar copies of records kept in the regular course of business, whether or not the original is still in existence, provided the reproduction is satisfactorily identified. An enlargement of the reproduction is also admissible.

Case Annotations

State v. Giacomantonio, 2016 WI App 62, ¶¶ 30–32, 371 Wis. 2d 452, 885 N.W.2d 394.

Photographs (screen shots) of text messages can be considered "originals" when there is testimony that they accurately reflect the data.

Anderson v. State, 66 Wis. 2d 233, 246–47, 223 N.W.2d 879 (1974).

There is no rule in Wisconsin requiring the "best" evidence, except with respect to writings, recordings, and photographs, for which the original is required when the content of the writing, recording, or photograph is sought to be proved. With respect to photographs, when the contents are sought to be proved, the subject of the photograph need not be offered, but only the original photograph.

Chapter 31
Originals and Duplicates

910.02 Requirement of original.

To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in chs. 901 to 911, s. 137.21, or by other statute.

Judicial Council Committee's Note (1974)

Wisconsin applies this rule to documentary evidence. *York v. State*, 45 Wis. 2d 550, 173 N.W.2d 693 (1970); *Goetsch v. State*, 45 Wis. 2d 285, 172 N.W.2d 688 (1969); *Peterson v. Warren*, 31 Wis. 2d 547, 143 N.W.2d 560 (1966); *Mack Trucks, Inc. v. Sunde*, 19 Wis. 2d 129, 119 N.W.2d 321 (1963). S. 889.29 ameliorates the rule with respect to photographic copies of business and public records. The rule expands beyond documents in accord with the definitions of s. 910.01. Wisconsin concurs in the distinction between content of a writing and an independently existing fact, *York v. State*, *supra*, which has been reduced to writing, *Goetsch v. State*, *supra*.

Case Annotations

State v. Giacomantonio, 2016 WI App 62, ¶¶ 29–32, 371 Wis. 2d 452, 885 N.W.2d 394.

The best-evidence rule does not bar screen shots of text messages, which are "originals" under Wis. Stat. § 910.01(3). Even if they were considered "duplicates" in this case, there was no genuine question as to their authenticity. *See* Wis. Stat. § 910.03.

State v. Bauer, 123 Wis. 2d 444, 456, 368 N.W.2d 59 (Ct. App. 1985).

In a criminal case, when photographs have been lost, the reliability of photograph identification cannot be proved by oral testimony.

Authors' Note. The Wisconsin Supreme Court in *State v. Bauer*, 127 Wis. 2d 125, 377 N.W.2d 175 (1985), vacated the above decision because the photographs had been found.

Sage v. State, 87 Wis. 2d 783, 788, 275 N.W.2d 705 (1979).

Admission of photographs as evidence is a matter within the trial court's discretion. They should be admitted if they will help the jury gain a better understanding of the material facts; they should be excluded if they are not "substantially necessary" to show material facts and will tend to create sympathy or indignation or direct the jury's attention to improper considerations.

Mitchell v. State, 84 Wis. 2d 325, 340, 267 N.W.2d 349 (1978).

Testimony regarding ownership is permitted in lieu of documents of title, etc. The best-evidence rule only applies when attempting to prove the contents of a document. While documentary evidence of ownership may carry more weight than uncorroborated testimony, it does not raise a question of admissibility under the best-evidence rule.

Anderson v. State, 66 Wis. 2d 233, 246–47, 223 N.W.2d 879 (1974).

There is no requirement that the best evidence be produced, except with respect to writings, recordings, or photographs.

When the contents of photographs are sought to be proved, the subject of the photograph need not be offered. Only the original photograph is necessary.

910.03 Admissibility of duplicates.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. No duplicate is inadmissible solely because it is in electronic format.

Judicial Council Committee's Note (1974)

The need for a genuine question of authenticity or unfairness to justify exclusion of a duplicate has been supported in *Peterson v. Warren*, 31 Wis. 2d 547, 143 N.W.2d 560 (1966); *Grunwaldt v. State Highway Comm'n*, 21 Wis. 2d 153, 124 N.W.2d 13 (1963); *Mack Trucks, Inc. v. Sunde*, 19 Wis. 2d 129, 119 N.W.2d 321 (1963); *Kubiak v. General Acc. F. & L. Assur. Corp.*, 15 Wis. 2d 344, 113 N.W.2d 46 (1962); *Shellow v. Hagen*, 9 Wis. 2d 506, 101 N.W.2d 694 (1960). However, some photographic duplicates are admissible irrespective of challenges to authenticity or fairness, s. 889.29 (photographic copies of business and public records).

Case Annotations

State v. Giacomantonio, 2016 WI App 62, ¶¶ 29–32, 371 Wis. 2d 452, 885 N.W.2d 394.

If screen shots are determined to be duplicates under Wis. Stat. § 910.01(3), the best-evidence rule will not bar their admission if the authenticity of the originals is not in dispute.

State v. Curtis, 218 Wis. 2d 550, 555–56, 582 N.W.2d 409 (Ct. App. 1998).

Audiotapes are properly identified and authenticated when a party to the recorded conversation identifies the voices and testifies that the tapes accurately depict the conversation. Duplicates of audiotapes authenticated in this manner are admissible under Wis. Stat. § 910.03.

Schulz v. St. Mary's Hosp., 81 Wis. 2d 638, 648, 260 N.W.2d 783 (1978).

Photostatic copies are produced by a technique that accurately reproduces the original and therefore are "duplicates" under this section. They are admissible to the same extent as an original unless a genuine question as to the authenticity of the original is raised.

910.04 Admissibility of other evidence of contents.

The original is not required, and other evidence of the contents of a writing, recording or photograph is admissible if:

(1) ORIGINALS LOST OR DESTROYED. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) ORIGINAL NOT OBTAINABLE. No original can be obtained by any available judicial process or procedure; or

(3) ORIGINAL IN POSSESSION OF OPPONENT. At a time when an original was under the control of the party against whom offered, the party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or

(4) COLLATERAL MATTERS. The writing, recording or photograph is not closely related to a controlling issue.

Judicial Council Committee's Note (1974)

Sub. (1). Wisconsin cases are in accord. *Harper, Drake & Assocs. v. Jewett & Sherman Co.*, 49 Wis. 2d 330, 182 N.W.2d 551 (1971); *Peterson v. Warren*, 31 Wis. 2d 547, 143 N.W.2d 560 (1966); *Shellow v. Hagen*, 9 Wis. 2d 506, 101 N.W.2d 694 (1960); *Blaha v. Borgman*, 142 Wis. 43, 124 N.W. 1047 (1910). Note that in Wisconsin one may bring oneself within the rule only by showing loss or destruction through testimony of a reasonable search, or the production of the person last known to have custody. Mere assertions or perfunctory showings of diligence will not ordinarily suffice, *Whalen v. State Farm Mut. Auto. Ins. Co.*, 51 Wis. 2d 635, 187 N.W.2d 820 (1971); *Harper, Drake & Assocs. v. Jewett & Sherman*, *supra*; *Peterson v. Warren*, *supra*.

Sub. (2). This rule is consistent with Wisconsin cases, *Peterson v. Warren*, 31 Wis. 2d. 547, 143 N.W.2d 560 (1966); *Grunwaldt v. State Highway Comm'n*, 21 Wis. 2d 153, 124 N.W.2d 13 (1963); *Mack Trucks, Inc. v. Sunde*, 19 Wis. 2d 129, 119 N.W.2d 321 (1963); *Kubiak v. General Acc. F. & L. Assur. Corp.*, 15 Wis. 2d 344, 113 N.W.2d 46 (1962); *Shellow v. Hagen*, 9 Wis. 2d 506, 101 N.W.2d 694 (1960); *Ziebell v. Fraternal Reserve Ass'n*, 158 Wis. 612, 149 N.W. 475 (1914); *Bruger v. Princeton & St. Marie M. F. Ins. Co.*, 129 Wis. 281, 109 N.W. 95 (1906); *Speiser v. Phoenix Mut. L. Ins. Co.*, 119 Wis. 530, 97 N.W. 207 (1903); *Wisconsin River Lum. Co. v. Walker*, 48 Wis. 614, 4 N.W. 803 (1880); *Bonner v. Home Ins. Co.*, 13 Wis. 677 (1861).

Sub. (3). Early Wisconsin cases apply the substance of this rule after timely and reasonable notice to produce a document for the trial, *Tewsbury v. Schulenberg*, 48 Wis. 577, 4 N.W. 757 (1880); *Barton v. Kane*, 17 Wis. 37, 84 Am. Dec. 728 (1863); *Eastman v. Bennett*, 6 Wis. 232 (1857). If the document is present at trial, failure of proper notice to produce does not justify exclusion of secondary evidence, *Barker v. Barker*, 14 Wis. 131 (1861). There have been no Wisconsin cases dealing with notice from pleadings. Compliance with the notice requirement does not require a demand to admit documents in the manner required by s. 889.22. *Grunwaldt v. State Highway Comm'n*, 21 Wis. 2d 153, 124 N.W.2d 13 (1963); *Mack Trucks, Inc. v. Sunde*, 19 Wis. 2d 129, 119 N.W.2d 321 (1963).

Sub. (4). Wisconsin is in accord, *Harper, Drake & Assocs. v. Jewett & Sherman*, 49 Wis. 2d 330, 182 N.W.2d 551 (1971); *Sleep v. Heymann*, 57 Wis. 495, 16 N.W. 17 (1883).

Authors' Note. *See also* Wis. Stat. § 943.50(3m)(a) (in any action or proceeding for violation of Wis. Stat. § 943.50 ("Retail theft; theft of services"), duly identified and authenticated photographs of merchandise that was subject of violation may be used as evidence in lieu of producing merchandise).

Case Annotations

State v. Ford, 2007 WI 138, ¶¶ 63–69, 306 Wis. 2d 1, 742 N.W.2d 61.

When a videotape purporting to show evidence of a crime is damaged and unplayable, the proponent of the evidence makes reasonable efforts to restore the tape to playability, and those efforts fail, the tape is destroyed within the meaning of Wis. Stat. § 910.04(1). For the purpose of this rule, "destroyed" does not mean obliterated. So long as the contents of the item of evidence can no longer be discerned, the item is destroyed and the testimony concerning the contents of the item is admissible.

Ritt v. Dental Care Assocs., 199 Wis. 2d 48, 72–74, 543 N.W.2d 852 (Ct. App. 1995).

In a dental malpractice action, the trial court properly excluded the dentist's appointment book when the original treatment records, through no bad faith of the defendant dentist, were lost or destroyed. The entries made by the dentist in his appointment book were not evidence that the plaintiff actually came in to the scheduled appointments and received any particular treatment from the dentist. The appointment book's showing that appointments may have been made, contrary to the plaintiff's testimony, did not make the appointment book "other evidence" of the treatment records.

Chapter 32
Public Records, Summaries, and Admissions

910.05 Public records.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with s. 909.02 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Judicial Council Committee's Note (1974)

The admissibility of certified copies in lieu of the originals of public records or recorded or filed documents has long been the rule in Wisconsin, *Johnson v. Ashland Lumber Co.*, 52 Wis. 458, 9 N.W. 464 (1881); *Sexsmith v. Jones*, 13 Wis. 565 (1861); *Fouke v. Ray*, 1 Wis. 104 (1853); *see also Estate of Shega*, 38 Wis. 2d 269, 156 N.W.2d 392 (1968). The principle is also embraced in chs. 889 and 891. Secondary evidence of lesser stature than certified copies is admissible upon a showing of diligence in attempting to produce the originals or certified copies. *Whalen v. State Farm Mut. Auto. Ins. Co.*, 51 Wis. 2d 635, 187 N.W.2d 820 (1971); *Peterson v. Warren*, 31 Wis. 2d 547, 143 N.W.2d 560 (1966); *Shellow v. Hagen*, 9 Wis. 2d 506, 101 N.W.2d 694 (1960). The provision for certification pursuant to s. 909.02 does not appear to contravene the specific provisions of applicable statutes because of the provisions of ss. 909.02(4) and (10). The rule is expanded to include data compilations pursuant to s. 910.01. The testimony of a witness who has compared the copy with original as an alternative to certification is an expansion of the Wisconsin rule. *Cf. Ernst v. Greenwald*, 35 Wis. 2d 763, 151 N.W.2d 706 (1967), and *Jesse v. Tinkham*, 207 Wis. 49, 239 N.W. 455 (1932).

Case Annotations

State v. Leis, 134 Wis. 2d 441, 445, 397 N.W.2d 498 (Ct. App. 1986).

Extrinsic evidence of authenticity is not required as a precondition to admissibility when a public document is certified.

910.06 Summaries.

The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.

Judicial Council Committee's Note (1974)

This section is consistent with Wisconsin cases, *Tri-Motors Sales, Inc. v. Travelers Indem. Co.*, 19 Wis. 2d 99, 119 N.W.2d 327 (1963); *Graton & Knight Co. v. Mayville Shoe Corp.*, 247 Wis. 11, 18 N.W.2d 359 (1945); *Estate of Lemke*, 206 Wis. 5, 238 N.W. 806 (1931); *Riesen v. School District No. 4 of Village of Shorewood*, 192 Wis. 283, 212 N.W. 783 (1927). Note that the admissibility of a summary will be governed in varying instances by the admissibility of the underlying documents, the first-hand knowledge of the witness of the underlying facts, or the evidence which is summarized. See above cases. The rule is expanded to recordings and photographs.

Case Annotations

City of Menomonie v. Evensen Dodge, Inc., 163 Wis. 2d 226, 237–38, 471 N.W.2d 513 (Ct. App. 1991).

A trust company's analysis of economic benefits accruing to it from uninvested trust funds was admissible as a summary or compilation. The disputed documentary evidence consisted of schedules with attached source materials that referred to transaction dates, the underlying documentation was made available before trial, and each party had copies of the trust agreement with attached schedules.

Town of Fifield v. State Farm Mut. Auto Ins. Co., 120 Wis. 2d 227, 229, 353 N.W.2d 788 (1984).

A summary of original invoices and cost records, prepared by the town clerk to show the cost of a temporary detour and bridge removal, could be used by the town chairman to support his testimony.

910.07 Testimony or written admission of party.

Contents of writings, recordings or photographs may be proved by the testimony or deposition of the party against whom offered or by the party's written admission, without accounting for the nonproduction of the original.

Judicial Council Committee's Note (1974)

This section represents the modification of Wigmore's view by McCormick. No Wisconsin case has discussed the rule which has its origin in an 1840 English case. However, Wisconsin has acknowledged the admissibility and relevancy of a written admission in *Marek v. Knab Co.*, 10 Wis. 2d 390, 103 N.W.2d 31 (1960), and *Schultz v. Williams*, 207 Wis. 122, 240 N.W. 844 (1932), and the plausibility of the proposition that a genuine question of authenticity must exist to require production of the original. See the Judicial Council Committee's Note to s. 910.03.

910.08 Functions of judge and jury.

When the admissibility of other evidence of contents of writings, recordings or photographs under chs. 901 to 911 depends upon the fulfillment of a condition of fact, the question of whether the condition has been fulfilled is ordinarily for the judge to determine. However, when any of the following issues is raised, the issue is for the trier of fact to determine as in the case of other issues of fact:

(1) Whether the asserted writing ever existed.

(2) Whether another writing, recording or photograph produced at the trial is the original.

(3) Whether other evidence of contents correctly reflects the contents.

Judicial Council Committee's Note (1974)

This section is consistent with the Wisconsin cases cited in the comment to s. 901.04, and *Whalen v. State Farm Mut. Auto. Ins. Co.*, 51 Wis. 2d 635, 187 N.W.2d 820 (1971); *Harper, Drake & Assocs. v. Jewett & Sherman*, 49 Wis. 2d 330, 182 N.W.2d 551 (1971) and *Peterson v. Warren*, 31 Wis. 2d 547, 143 N.W.2d 560 (1966), which emphasize the function of the trial judge in exercising his discretion with respect to foundation testimony and its application to the original writings rule. The weight and credibility of the admissible evidence upon which the preliminary question was determined by the judge is, of course, ultimately for the trier of the fact.

Chapter 33

Miscellaneous Rules

911.01 Applicability of rules of evidence.

(1) COURTS AND COURT COMMISSIONERS. Chapters 901 to 911 apply to the courts of the state of Wisconsin, including municipal courts and circuit, supplemental, and municipal court commissioners, in the proceedings and to the extent hereinafter set forth except as provided in s. 972.11. The word "judge" in chs. 901 to 911 means judge of a court of record, municipal judge, or circuit, supplemental, or municipal court commissioner.

(2) PROCEEDINGS GENERALLY. Chapters 901 to 911 apply generally to proceedings in civil and criminal actions.

(3) PRIVILEGES; OATH. Chapter 905 with respect to privileges applies at all stages of all actions, cases and proceedings; s. 906.03 applies at all stages of all actions, cases and proceedings except as provided in ss. 901.04(1) and 911.01(4), and ch. 908.

(4) RULES OF EVIDENCE INAPPLICABLE. Chapters 901 to 911, other than ch. 905 with respect to privileges or s. 901.05 with respect to admissibility, do not apply in the following situations:

(a) *Preliminary questions of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under s. 901.04(1).

(b) *Grand jury; John Doe proceedings.* Proceedings before grand juries or a John Doe proceeding under s. 968.26.

(c) *Miscellaneous proceedings.* Proceedings for extradition or rendition; sentencing, granting or revoking probation, modification of a bifurcated sentence under s. 302.113(9g), or adjustment of a bifurcated sentence under s. 973.195(1r) or 973.198; hearings for the freezing of assets of a person charged with financial exploitation of an elder person under s. 971.109; issuance of subpoenas or warrants under s. 968.375, arrest warrants, criminal summonses, and search warrants; hearings under s. 980.09(2); proceedings under s. 971.14(1r)(c); proceedings with respect to pretrial release under ch. 969 except where habeas corpus is utilized with respect to release on bail or as otherwise provided in ch. 969; or proceedings under s. 165.76(6) to compel provision of a biological specimen for deoxyribonucleic acid analysis.

(d) *Small claims actions.* Proceedings under ch. 799, except jury trials.

(5) RESTITUTION HEARINGS.

(a) In a restitution hearing under s. 973.20(13), the rules of evidence are subject to waiver under s. 973.20(14)(d).

(b) When hearing evidence as to the factors that determine a restitution order under s. 800.093, the rules of evidence are subject to waiver under s. 800.093(8)(b).

Judicial Council Notes (1981)

Sub. (4)(c) has been amended to exempt the so-called McCredden hearings under s. 971.14(1)(c) from the rules of evidence.

Authors' Note. Wis. Stat. § 971.14(1)(c), referred to in the 1981 Judicial Council Note, was renumbered as Wis. Stat. § 971.14(1r)(c) by 2009 Wis. Act 214.

Judicial Council Committee's Note (1974)

Sub. (1). The applicability of the chapters prescribed by this section is consistent with ss. 901.01 and 972.11. The applicability to court commissioners is required by ss. 247.23, 252.25 and 252.152. The definition of "judge" is consistent with s. 967.02(6) but not as restrictive.

Sub. (2). Actions are of two kinds: civil and criminal, s. 260.05; however, ss. 260.01, 260.02 and 260.03 and Title XLVII refer to special proceedings and criminal proceedings. The wording of this section is designed to assure application to all proceedings in civil and criminal actions except as provided in ss. 901.01 and 972.11, and ch. 911.

Sub. (3). The nature of rules of privilege requires that their application may not be limited. The special treatment with respect to the oath assures its availability, where needed, to proceedings that may not require evidentiary rules. Making the oath available is not construed to

constitute a limitation upon the authority to receive hearsay testimony in the determination of a preliminary question of fact under ss. 901.04(1) and 911.01(4), or under ch. 908.

Sub. (4). Par. (a) is a repetition for convenience of s. 901.04(1). Par. (b) accords similar exclusion of evidentiary rules from application to Grand Jury or John Doe proceedings. Par. (c) exempts extradition and rendition proceedings (ss. 48.991, 976.01 and 976.02) from evidentiary rules because of the administrative character of the proceeding. Sentencing and granting or revoking of probation do not require the application of evidentiary rules, *Hammill v. State*, 52 Wis. 2d 118, 120, 187 N.W.2d 792, 793 (1971); *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 549, 185 N.W.2d 306, 311 (1971). Note, however, that such a hearing must meet "due process" requirements. The issuance of warrants for arrest, criminal summonses and search warrants are procedural matters prescribed by statute to which evidentiary rules are inapplicable and inappropriate, ss. 968.02, 968.04, 968.05, 968.06 and 968.12, because "due process" and "probable cause" are sufficient safeguards. Release on bail proceedings involves wide discretion of the judge subject to the commands that the bail be "reasonable," *Whitty v. State*, 34 Wis. 2d 278, 286, 149 N.W.2d 557, 560 (1971), *certiorari denied* 390 U.S. 959, 88 S. Ct. 1056, 19 L. Ed. 2d 1155, and not "excessive" (Sec. 6, Art. I, Wisconsin Constitution and Eighth Amendment to the United States Constitution). However, when collaterally attacked by habeas corpus, a special proceeding (ss. 291.01, 260.02 and 260.03) chs. 901 through 911 are applicable.

This subsection differs from the Proposed Federal Rules, which exclude preliminary examinations from the application of evidentiary rules. Federal criminal procedure relies heavily upon indictment which eliminates a preliminary examination. Wisconsin relies heavily upon a complaint which requires a preliminary examination unless waived. A preliminary examination is not a preliminary trial, *State v. Knudson*, 51 Wis. 2d 270, 280, 187 N.W.2d 321, 327 (1971), but does have by-product benefits for the accused, *Whitty v. State*, *supra.* Although the judicial determination of probable cause is comparable to other proceedings referred to in this subsection which are excluded from the application of the rules of evidence, the reporter for the Criminal Rules Committee advises that in its revision of criminal procedure, the committee intended the application of the rules of evidence to a preliminary examination.

Authors' Note. Wis. Stat. §§ 48.299(4)(b) and 938.299(4)(b) make the rules of evidence substantially inapplicable at juvenile waiver hearings, custody hearings, dispositional hearings, and certain other enumerated types of Children's Code and Juvenile Justice Code hearings.

Case Annotations

(1) Courts and Court Commissioners

(2) Proceedings Generally

AllEnergy Corp. v. Trempealeau Cnty. Env't & Land Use Comm., 2017 WI 52, ¶¶ 77–86, 375 Wis. 2d 329, 895 N.W.2d 368.
The Wisconsin Rules of Evidence govern court proceedings, not administrative proceedings.

State v. Kleser, 2010 WI 88, ¶¶ 88–89, 328 Wis. 2d 42, 786 N.W.2d 144.
The rules of evidence apply to reverse-waiver hearings under Wis. Stat. § 970.032(2) for juveniles in criminal court because such hearings are not listed as an exception in Wis. Stat. § 911.01(4).

Goranson v. DILHR, 94 Wis. 2d 537, 551, 289 N.W.2d 270 (1980).
The rules of evidence govern proceedings in the state's courts. DILHR is not a court. Therefore, proceedings before DILHR in worker's compensation cases do not require strict adherence to the statutory rules of evidence.

Note. DILHR was the predecessor to the Wisconsin Department of Workforce Development (DWD).

(3) Privileges; Oath

Muetze v. State, 73 Wis. 2d 117, 126, 243 N.W.2d 393 (1976).
The rules of privilege contained in the Wisconsin Rules of Evidence apply to proceedings before a magistrate to obtain a search warrant.

(4) Rules of Evidence Inapplicable

(a) Preliminary Questions of Fact

State v. Jiles, 2003 WI 66, ¶¶ 29–30, 262 Wis. 2d 457, 663 N.W.2d 798.

The rules of evidence do not apply in determining preliminary questions of fact concerning the admissibility of evidence. Thus, the court need not apply the rules of evidence at a suppression hearing, including one that raises *Miranda/Goodchild* issues. *See State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965) (discussing procedure for determining voluntariness of confession).

(c) Miscellaneous Proceedings

State v. Saunders, 2002 WI 107, ¶¶ 38–46, 255 Wis. 2d 589, 649 N.W.2d 263.

The rules of evidence do not apply to the state's mode of proof of prior convictions for sentence-enhancement purposes. Habitual criminality is an element that factors into sentencing and thus has similar evidentiary requirements.

State v. Spaeth, 206 Wis. 2d 135, 151–52, 556 N.W.2d 728 (1996).

Although a sentencing court is not restricted by the rules of evidence, a court cannot impose an enhanced penalty for a repeat conviction for operating a motor vehicle after revocation (OAR) when the evidence of prior convictions consists solely of uncorroborated information alleged in the complaint. If the state chooses to rely solely on the complaint to establish serial OAR convictions, the complaint must be accompanied by reliable documentary corroboration that includes the dates of each prior OAR offense and conviction, as well as the basis for the underlying license revocation. The state can establish prior OAR convictions if it introduces into the record one of the following: (1) an admission; (2) copies of prior judgments of conviction for OAR; or (3) a teletype of the defendant's Department of Transportation driving record.

State v. Mosley, 201 Wis. 2d 36, 45, 547 N.W.2d 806 (Ct. App. 1996).

The rules of evidence do not apply at a criminal sentencing hearing. Thus, the court can consider hearsay testimony.

State v. Koeppen, 195 Wis. 2d 117, 131, 536 N.W.2d 386 (Ct. App. 1995).

Although the rules of evidence do not apply at sentencing hearings, under Wis. Stat. § 973.12(1), some formal proof is necessary as to repeater allegations.

State v. Hays, 173 Wis. 2d 439, 448, 496 N.W.2d 645 (Ct. App. 1992).

The rules of evidence are not applicable to either a hearing granting probation or a hearing modifying probation.

State v. Marhal, 172 Wis. 2d 491, 502, 493 N.W.2d 758 (Ct. App. 1992).

The rules of evidence do not apply at sentencing. A sentencing court may even consider evidence that has been suppressed because it was obtained in violation of the defendant's Fourth Amendment rights, as long as law enforcement officers do not intentionally violate the Fourth Amendment to obtain the evidence with which to enhance the sentence.

State ex rel. N/S Assocs. v. Board of Rev., 164 Wis. 2d 31, 57 n.8, 473 N.W.2d 554 (Ct. App. 1991).

The rules of evidence do not apply to board of review proceedings.

J.A.L. v. State (In the Int. of J.A.L.), 162 Wis. 2d 940, 973, 471 N.W.2d 493 (1991).

The rules of evidence do not apply to juvenile waiver hearings. *See* Wis. Stat. § 938.299(4)(b).

State v. Scherreiks, 153 Wis. 2d 510, 521, 451 N.W.2d 759 (Ct. App. 1989).

The rules of evidence do not apply to sentencing proceedings. Therefore, victim-impact statements received at sentencing are not excludable on hearsay grounds.

(5) Restitution Hearings

911.02 Title.

Chapters 901 to 911 may be known and cited as the Wisconsin Rules of Evidence.

Appendix A

Crawford and the Right to Confrontation

In *Crawford v. Washington*, 541 U.S. 36 (2004), the U.S. Supreme Court held that criminal defendants' Sixth Amendment right to confront witnesses against them controls as against testimonial statements made by witnesses not present at trial, even when the statements fall within exceptions to the rule against hearsay. Before, if hearsay statements fell within the firmly rooted exceptions to the rule against hearsay, they were sufficiently reliable to overcome Confrontation Clause concerns. *See Ohio v. Roberts*, 448 U.S. 56 (1980). The *Roberts* rule still applies to statements that are not testimonial.

As concisely outlined by Professor Daniel Blinka:

> In brief summary, the *Crawford* doctrine structures the prosecution's use of hearsay evidence as follows. First, the State must comply with the rules of evidence. An out-of-court statement used to prove the truth of an assertion must fall within a hearsay exemption or exception. Second, the confrontation right demands that testimonial hearsay be distinguished from nontestimonial hearsay. Testimonial hearsay may be used against the defendant only where (1) the declarant testifies at trial, or (2) the declarant is shown to be unavailable despite the prosecution's good faith effort to produce him or her, *and* the defendant had a prior opportunity to cross-examine the declarant.

7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* § 802.301 (4th ed.), Westlaw (database updated Aug. 2023) (internal citations to treatise omitted).

Under *Crawford*, the threshold question is whether the statement is testimonial. *Crawford* did little to define *testimonial* statements, although it did identify several statements that are testimonial, such as statements given in response to police officers' interrogation and statements given at a preliminary hearing. Generally, a testimonial statement is determined by whether the declarant's primary purpose is to create "'an out-of-court substitute for trial testimony.'" *Ohio v. Clark*, 576 U.S. 237, 245 (2015) (quoting *Michigan v. Bryant*, 562 U.S. 344, 358 (2011)). "The linchpin is the declarant's primary motivation to provide evidence against a suspect." Blinka, *supra*, § 802.302.

In *Clark*, the Court held that statements made by a three-year-old to his preschool teachers regarding abuse were not testimonial and did not implicate the Confrontation Clause because the questioning was informal and motivated by the intent to resolve an emergency. The Court noted that statements by young children rarely implicate the Confrontation Clause and that mandatory reporting laws do not necessarily convert teachers into state actors.

The "primary purpose test" established by *Davis v. Washington*, 547 U.S. 813 (2006), remains the key to determining whether a statement is testimonial. It says that a statement is testimonial if its primary purpose is "to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822. Factors to be considered include (1) whether there is an ongoing emergency, *id.*; (2) the statements and actions of the declarant and the interrogators, *see Bryant*, 562 U.S. at 367; and (3) the formality of the encounter, *id.* at 366. In the years since *Davis*, the primary purpose test has been fleshed out by many federal and state cases. In *Bryant*, 562 U.S. at 357, the Court addressed the definition of ongoing emergencies, finding that the test is an objective one that considers, for example, whether the statement was made to "end a threatening situation." In *Clark*, 576 U.S. at 246, the Court confirmed that the Confrontation Clause may be applied to statements made to persons other than law enforcement.

In *United States v. Graham*, 47 F.4th 561, 568–69 (7th Cir. 2022), the U.S. Court of Appeals for the Seventh Circuit, citing *Davis* and *Bryant*, held the statement of a sex-trafficking coconspirator, recorded on a police officer's body camera, was not testimonial. Police officers had been called to break up a fight at a motel between the defendant and his coconspirator, who told police officers that the defendant was prostituting young women and was holding and prostituting a 19-year-old in a room at the motel. Applying the primary purpose test, the court noted the officers' purpose was to resolve the ongoing emergency of a fight in progress and sex trafficking occurring at the motel. The statement was made spontaneously and in response to unfolding events and, accordingly, was not testimonial.

Several Wisconsin cases address the meaning of "testimonial."

In *State v. Mattox*, 2017 WI 9, 373 Wis. 2d 122, 890 N.W.2d 256, the Wisconsin Supreme Court adopted the four factors suggested in *Ohio v. Clark*, 576 U.S. at 245–49, relevant to determining whether the primary purpose of a statement is to gather evidence or substitute for testimony such that the statement should be considered testimonial: "(1) the formality/informality of the situation producing the out-of-court statement; (2) whether the statement is given to law enforcement or a non-law enforcement individual; (3) the age of the declarant; and (4) the context in which the statement was given." *Id.* ¶ 32 (footnote omitted).

In *State v. Ramirez*, 2023 WI App 63, ¶¶ 75–83, 410 Wis. 2d 224, 1 N.W.3d 719 (review denied), the Wisconsin Court of Appeals applied the *Mattox* factors in a sexual-assault case to conclude that an eight-year-old girl's statements to a hospital emergency room nurse and doctor were made for the primary purpose of medical treatment, not for evidence-gathering or as a substitute for testimony. Therefore, the Confrontation Clause was not implicated as to those statements. For statements that do implicate the Confrontation Clause, harmless error is an available option. The *Ramirez* court held that any error in admitting other statements of the girl and of her brother to police officers at the police station the

following day was harmless. Given the totality of the evidence, the court concluded beyond a reasonable doubt that there was no reasonable possibility the verdicts would have been any different without the statements. *Id.* ¶¶ 84–93.

In *State v. Keller*, 2021 WI App 22, 397 Wis. 2d 122, 959 N.W.2d 343, the court applied the *Mattox* factors and concluded that the confidential statements of persons reporting concerns about a child's well-being to child protective services employees were not testimonial because their primary purpose was to improve the treatment and conditions of the child. *Keller*, 2021 WI App 22, ¶ 26, 397 Wis. 2d 122 (citing *State v. Nelson*, 2021 WI App 2, ¶ 29, 395 Wis. 2d 585, 954 N.W.2d 11).

In *State v. Jensen (Jensen III)*, 2021 WI 27, 396 Wis. 2d 196, 957 N.W.2d 244, the Wisconsin Supreme Court applied the law-of-the-case doctrine to affirm its application of the primary purpose test in *State v. Jensen (Jensen I)*, 2007 WI 26, 299 Wis. 2d 267, 727 N.W.2d 518. All the *Jensen* decisions arose from a situation in which the defendant's wife wrote a letter to a neighbor with instructions to give it to the police if anything should happen to her and also left voicemails for a police officer stating that if she were found dead, the defendant should be the "first suspect." *Jensen III*, 2021 WI 27, ¶ 2, 396 Wis. 2d 196. The court held that the statements were testimonial because their primary purpose was not to help the police resolve an ongoing emergency but to "investigate or aid in prosecution in the event of her death." *Jensen III*, 2021 WI 27, ¶ 4, 396 Wis. 2d 196; *Jensen I*, 2007 WI 26, ¶ 27, 299 Wis. 2d 267.

In *Nelson*, 2021 WI App 2, 395 Wis. 2d 585, a nurse practitioner, as a surrogate witness, testified about the report of another nurse practitioner who conducted an examination of the complaining witness in a sexual assault case 11 days after the incident. In a split decision, the court of appeals held the report was not testimonial and there was no Confrontation Clause violation. The majority applied the *Mattox* factors, 2017 WI 9, ¶ 32, 373 Wis. 2d 122, and concluded the report of the examination was primarily focused on the complainant's health, not the gathering of evidence for prosecution or serving as a substitute for testimony. *Nelson*, 2021 WI App 2, ¶ 37, 395 Wis. 2d 585. The dissent drew the opposite conclusion. The concurrence cautioned that the majority's holding on these specific facts should not be taken to mean that, in general, the testimony of an examining nurse in a sexual assault case will be considered nontestimonial. *Id.* ¶ 62 (Davis, J., concurring).

In *State v. Reinwand*, 2019 WI 25, ¶¶ 25–32, 385 Wis. 2d 700, 924 N.W.2d 184, the Wisconsin Supreme Court applied the *Mattox* factors to hold that a homicide victim's statements that he was afraid the defendant would kill him were not testimonial because (1) they were informal in nature; (2) they were not provided to law enforcement; and (3) the overall context of the statements failed to demonstrate that they were made in an attempt to create a substitute for trial testimony. (A fourth factor—age of the defendant—was not relevant.)

In *State v. Nieves*, 2017 WI 69, ¶¶ 36–51, 376 Wis. 2d 300, 897 N.W.2d 363, the court held that a codefendant's statements to another jail inmate were not testimonial, and therefore there was no violation of the defendant's confrontation rights under *Bruton v. United States*, 391 U.S. 123 (1968).

Authors' Note. *Bruton* held that, under the Confrontation Clause, an out-of-court statement made by a codefendant that inculpates a defendant cannot be used at trial when the codefendant does not testify. In *Nieves*, the Wisconsin court concluded that *Crawford* limited the application of *Bruton* to testimonial statements. Although a discussion of *Bruton* cases is beyond the scope of this appendix, the authors believe it worth noting that *Bruton* has been limited in other ways. In *Samia v. United States*, 599 U.S. 635 (2023), the Court approved the admission of a nontestifying codefendant's confession that did not directly inculpate the defendant and was subject to a proper limiting instruction. The authors also remind readers of Wis. Stat. § 971.12(3), providing that a "district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant."

In *State v. Doss*, 2008 WI 93, 312 Wis. 2d 570, 754 N.W.2d 150, the court held that business records and the affidavits authenticating them were not testimonial.

In *State v. Manuel*, 2005 WI 75, 281 Wis. 2d 554, 697 N.W.2d 811, the court concluded the defendant's statements to his girlfriend were not testimonial because they were made in spontaneous private conversations shortly after the shooting. *See also State v. Searcy*, 2006 WI App 8, ¶¶ 53–54, 288 Wis. 2d 804, 709 N.W.2d 497 (holding that witness's unsolicited statements to police at scene of defendant's arrest were nontestimonial); *State v. Savanh*, 2005 WI App 245, ¶ 33, 287 Wis. 2d 876, 707 N.W.2d 549 (holding that co-conspirator's statements overheard by informant were nontestimonial).

Laboratory reports, and expert testimony based on them, have given rise to many cases. Professor Blinka's treatise thoroughly describes these in section 802.302. The latest U.S. Supreme Court case on the application of the Confrontation Clause to forensic evidence is *Smith v. Arizona*, 144 S. Ct. 1785 (2024). In that case, a crime lab analyst offered his opinion that substances seized from the defendant contained prohibited drugs. The analyst did not do the testing himself, but relied on the notes and report of another analyst, who did not testify. The Court held that the statements of the absent analyst were admitted for their truth, and not simply to show the basis for the testifying witness's opinion. Therefore, they constituted hearsay for *Crawford* purposes. *See also Bullcoming v. New Mexico*, 564 U.S. 647 (2011) ("surrogate" witness simply a hearsay

conduit who related contents of testimonial notes and reports of nontestifying witness); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (certificate of state laboratory analyst stating that material seized by police and connected to the defendant was cocaine of a certain quantity was testimonial).

The Wisconsin courts have also decided several cases in which laboratory reports or related testimony were at issue. Listed here are several significant cases that come up with some regularity; however, caution must be exercised in applying them in light of the U.S. Supreme Court ruling in *Smith* that a nontestifying expert's statements that form the basis for a testifying expert's opinion given in court are hearsay for *Crawford* purposes. *Mattox*, 2017 WI 9, 373 Wis. 2d 122 (toxicology report requested by medical examiner was not testimonial); *State v. Griep*, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567 (section chief at state hygiene lab who reviewed work of another analyst could testify to that analyst's findings because the chief reached independent opinion regarding results); *State v. Deadwiller*, 2013 WI 75, 350 Wis. 2d 138, 834 N.W.2d 362 (state-crime-lab witness could testify to match of defendant's known DNA with profiles from crime scene that were analyzed by a private lab; any error was harmless); *State v. Heine*, 2014 WI App 32, ¶ 15, 354 Wis. 2d 1, 844 N.W.2d 409 (testifying physician was not a "mere conduit" for report of nontestifying toxicologist's report and could have given opinion without referring to report; any error was harmless); *State v. Barton*, 2006 WI App 18, ¶¶ 16, 20, 289 Wis. 2d 206, 709 N.W.2d 93 (crime lab unit leader who did peer review of nontestifying analyst's tests could testify to his own conclusions about those tests; *State v. Williams*, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, survives *Crawford*).

A court may allow the admission of testimonial hearsay only if the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 53–54. The unavailability requirement is discussed in *State v. King*, 2005 WI App 224, ¶¶ 6, 11–17, 287 Wis. 2d 756, 706 N.W.2d 181.

In *State v. Morales-Pedrosa*, 2016 WI App 38, ¶¶ 31–41, 369 Wis. 2d 75, 879 N.W.2d 772, several witnesses testified to statements another witness made to them. That other witness—the hearsay declarant—had testified before and had been "excused." The court held there was no Confrontation Clause violation because the record did not show the declarant was unavailable for recall to the stand after the other witnesses testified, and the defendant had a full and fair opportunity to cross-examine the declarant and the other witnesses. The court's conclusion followed from *State v. Nelis*, 2007 WI 58, 300 Wis. 2d 415, 733 N.W.2d 619.

The Confrontation Clause is satisfied when a witness appears at trial, takes the oath, and answers questions on cross-examination, even if the witness claims loss of memory about prior testimonial statements. *State v. Rockette*, 2006 WI App 103, ¶ 27, 294 Wis. 2d 611, 718 N.W.2d 269.

A testimonial statement in the form of a plea allocution was inadmissible under the Confrontation Clause when the individual who entered the plea was unavailable to testify at the defendant's trial. The opening-the-door principle of *People v. Reid*, 971 N.E.2d 353 (N.Y. 2012) (allowing evidence the court deems reasonably necessary to correct misleading evidence or argument), does not override the constitutional protections of the Confrontation Clause, and trial judges cannot substitute their own weighing of credibility or reliability of testimonial evidence for the requirement of cross-examination to determine the veracity of that evidence. *Hemphill v. New York*, 595 U.S. 140, 150–56 (2022).

In *State v. Thomas*, 2023 WI 9, 405 Wis. 2d 654, 985 N.W.2d 87 (Dallet, J. concurring), a majority of the Wisconsin Supreme Court applied the principle of *Hemphill* to a case in which the defendant's expert reviewed a report on DNA evidence and, the state argued, "gave factually inaccurate testimony about" it. The defendant did not have the opportunity to cross-examine the author of the report. Following the reasoning in *Hemphill*, the court determined the defendant did not impliedly waive his Confrontation Clause right by offering the testimony of an expert who had reviewed the report. The court in *Thomas* held there was a Confrontation Clause violation because the state used the report for its truth, not only to impeach the defense expert on cross-examination. Nevertheless, the court determined the *Crawford* violation was harmless error.

The sequence set forth in Wis. Stat. § 908.08(5) for receiving audiovisual recordings of children's statements complies with *Crawford. State v. James*, 2005 WI App 188, 285 Wis. 2d 783, 703 N.W.2d 727.

The Sixth Amendment right to confrontation as explained in *Crawford* applies only to hearsay statements. *State v. Hanson*, 2019 WI 63, ¶¶ 19, 27 & n.14, 387 Wis. 2d 233, 928 N.W.2d 607.

The Confrontation Clause protects a defendant's right to confrontation at trial but not at suppression hearings, *State v. Zamzow*, 2017 WI 29, ¶ 1, 374 Wis. 2d 220, 892 N.W.2d 637, or preliminary examinations, *State v. O'Brien*, 2014 WI 54, ¶¶ 28–33, 354 Wis. 2d 753, 850 N.W.2d 8 (upholding constitutionality of Wis. Stat. § 970.038 hearsay exception).

There are two exceptions to the *Crawford* rule disallowing testimonial hearsay unless the declarant testifies or is unavailable and has been subject to cross-examination. The first is testimonial hearsay that meets the dying declaration exception to the hearsay rule. *State v. Beauchamp*, 2011 WI 27, 333 Wis. 2d 1, 796 N.W.2d 780; *State v. Owens*, 2016 WI App 32, 368 Wis. 2d 265, 878 N.W.2d 736.

The second is forfeiture by wrongdoing, by which the defendant intentionally deprives the prosecution of the witness's evidence. In *Giles v. California*, 554 U.S. 353 (2008), the Court held that this requires not only a showing that the defendant caused the unavailability of the witness

but also that the defendant had the particular purpose of making the witness unavailable. See also *Jensen v. Clements*, 800 F.3d 892 (7th Cir. 2015), overturning *State v. Jensen (Jensen II)*, 2011 WI App 3, 331 Wis. 2d 440, 794 N.W.2d 482, and holding that *Giles* superseded Wisconsin case law on forfeiture by wrongdoing, which had adopted a broader view of the doctrine. In *Reinwand*, 2019 WI 25, 385 Wis. 2d 700, the court held that the forfeiture-by-wrongdoing doctrine was not implicated because the declarant's statements were not testimonial.

Appendix B
Depositions at Trial

USE OF DEPOSITIONS AT TRIAL

The general rule is that a deposition, as an out-of-court statement, is hearsay if offered to prove the truth of the matter asserted, unless it is used to impeach, to rebut a charge of recent fabrication or improper motive, to identify, or as an admission by a party opponent. Thus, it is not admissible unless it qualifies as one of the hearsay exceptions under Wis. Stat. § 908.03 or 908.045.

Wis. Stat. § 804.07, titled "Use of depositions in court proceedings," greatly enlarges the admissibility of depositions at trial by declaring the rules of evidence are to be applied as if the witness were then present and testifying. This removes the out-of-court element of the hearsay definition in Wis. Stat. § 908.01(3). Nevertheless, a deposition admissible under Wis. Stat. § 804.07 is still subject to all the other rules of evidence, including hearsay contained within the deposition.

Before a deposition can be used at a trial pursuant to Wis. Stat. § 804.07, the following conditions must be met:

1. It must be used against a party.

2. The party against whom the deposition is used must have been present or represented at the taking of the deposition or have had reasonable notice.

Any deposition may be used to contradict or impeach the testimony of a deponent as a witness. Wis. Stat. § 804.07(1)(a).

Depositions of a party or of one who at the time of its taking was an officer, director, managing agent, employee, or designee authorized to testify, of a corporation, partnership, association, or governmental agency that is a party, may be used by an adverse party for any purpose. Wis. Stat. § 804.07(1)(b).

Depositions of medical experts may be used by any party for any purpose. Wis. Stat. § 804.07(1)(c)2.

Depositions of all other witnesses may be used for any purpose if the court finds that

1. The witness is dead;

2. The witness is located more than 30 miles from the place of trial or is out of state, unless the witness's absence was procured by the party offering the deposition;

3. The witness is unable to testify because of age, illness, infirmity, or imprisonment;

4. The attendance of the witness could not be procured by subpoena by the party offering the deposition; or

5. Upon application and notice, exceptional circumstances exist so as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in court, to allow the deposition to be used.

Wis. Stat. § 804.07(1)(c)1.

The presence in court of a medical expert or a party, or one who at the time of taking the deposition was an officer, director, managing agent, employee, or designee authorized to testify, of a corporation, partnership, association, or governmental agency that is a party, is irrelevant in terms of the use of that person's deposition by another party. Such a deposition may be used by another party at any time, for any purpose, regardless of the deponent's presence. As to any other person, however, a deposition cannot be used for purposes other than contradiction or impeachment, unless the deponent is unavailable for one of the five reasons set forth in Wis. Stat. § 804.07(1)(c)1. *See Hughes v. Chicago S. P., M. & O. Ry.*, 122 Wis. 258, 269–71, 99 N.W. 897 (1904); *see also* Wis. Stat. § 967.04(5) (regarding use of depositions in criminal proceedings); *Fisher v. Gibb*, 25 Wis. 2d 600, 606–11, 131 N.W.2d 382 (1964).

Wis. Stat. §§ 885.40–.47 govern the procedure for taking, recording, and playing videotape depositions. Wis. Stat. § 967.04(7) relates to taking and using audiovisually recorded testimony when a child is a witness.

Appendix C
Criminal Trials

972.11 Evidence and practice; civil rules applicable.

(1) Except as provided in subs. (2) to (4), the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction. No guardian ad litem need be appointed for a defendant in a criminal action. Chapters 885 to 895 and 995, except ss. 804.02 to 804.07 and 887.23 to 887.26, shall apply in all criminal proceedings.

(2)(a) In this subsection, "sexual conduct" means any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style.

(b) If the defendant is accused of a crime under s. 940.225, 942.09, 948.02, 948.025, 948.05, 948.051, 948.06, 948.07, 948.08, 948.085, 948.09, or 948.095, or under s. 940.302 (2), if the court finds that the crime was sexually motivated, as defined in s. 980.01 (5), any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to s. 971.31 (11):

1. Evidence of the complaining witness's past conduct with the defendant.

2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.

3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.

(c) Notwithstanding s. 901.06, the limitation on the admission of evidence of or reference to the prior sexual conduct of the complaining witness in par. (b) applies regardless of the purpose of the admission or reference unless the admission is expressly permitted under par. (b)1., 2. or 3.

(d)1. If the defendant is accused of a crime under s. 940.225, 942.09, 948.02, 948.025, 948.05, 948.06, 948.085, or 948.095, evidence of the manner of dress of the complaining witness at the time when the crime occurred is admissible only if it is relevant to a contested issue at trial and its probative value substantially outweighs all of the following:

a. The danger of unfair prejudice, confusion of the issues or misleading the jury.

b. The considerations of undue delay, waste of time or needless presentation of cumulative evidence.

2. The court shall determine the admissibility of evidence under subd. 1. upon pretrial motion before it may be introduced at trial.

(2m)(a) At a trial in any criminal prosecution, the court may, on its own motion or on the motion of any party, order that the testimony of any child witness be taken in a room other than the courtroom and simultaneously televised in the courtroom by means of closed-circuit audiovisual equipment if all of the following apply:

1. The court finds all of the following:

a. That the presence of the defendant during the taking of the child's testimony will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

b. That taking the testimony of the child in a room other than the courtroom and simultaneously televising the testimony in the courtroom by means of closed-circuit audiovisual equipment is necessary to minimize the trauma to the child of testifying in the courtroom setting and to provide a setting more amenable to securing the child witness's uninhibited, truthful testimony.

2. The trial in which the child may be called as a witness will commence:

a. Prior to the child's 12th birthday; or

am. Prior to the child's 18th birthday if the trial is for a prosecution for a violation of s. 940.302 or 948.051; or

b. Prior to the child's 16th birthday and, in addition to its finding under subd. 1., the court finds that the interests of justice warrant that the child's testimony be taken in a room other than the courtroom and simultaneously televised in the courtroom by means of closed-circuit audiovisual equipment.

(b) Among the factors which the court may consider in determining the interests of justice under par. (a)2. b. are any of the following:

1. The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.

2. The child's general physical and mental health.

3. Whether the events about which the child will testify constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.

4. The child's custodial situation and the attitude of other household members to the events about which the child will testify and to the underlying proceeding.

5. The child's familial or emotional relationship to those involved in the underlying proceeding.

6. The child's behavior at or reaction to previous interviews concerning the events involved.

7. Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.

8. Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.

9. The number of separate investigative, administrative and judicial proceedings at which the child's testimony may be required.

(bm) If a court orders the testimony of a child to be taken under par. (a), the court shall do all of the following:

1. To the extent it is practical and subject to s. 972.10 (3), schedule the testimony on a date when the child's recollection is likely to be fresh and at a time of day when the child's energy and attention span are likely to be greatest.

2. Provide a room for the child to testify from that provides adequate privacy, freedom from distractions, informality and comfort appropriate to the child's developmental level.

3. Order a recess whenever the energy, comfort or attention span of the child or other circumstances so warrant.

4. Determine that the child understands that it is wrong to tell a lie and will testify truthfully if the child's developmental level or verbal skills are such that administration of an oath or affirmation in the usual form would be inappropriate.

5. Before questioning by the parties begins, attempt to place the child at ease, explain to the child the purpose of the testimony and identify all persons attending.

6. Supervise the spatial arrangements of the room and the location, movement and deportment of all persons in attendance.

7. Allow the child to testify while sitting on the floor, on a platform or on an appropriately sized chair, or while moving about the room within range of the visual and audio recording equipment.

8. Bar or terminate the attendance of any person whose behavior is disruptive or unduly stressful to the child.

(c) Only the following persons may be present in the room in which the child is giving testimony under par. (a):

1m. Any person necessary to operate the closed-circuit audiovisual equipment.

2m. The parents of the child, the guardian or legal custodian of the child or, if no parent, guardian or legal custodian is available or the legal custodian is an agency, one individual whose presence would contribute to the welfare and well-being of the child.

3m. One person designated by the attorney for the state and approved by the court and one person designated by either the defendant or the attorney for the defendant and approved by the court.

(3)(a) In a prosecution under s. 940.22 involving a therapist and a patient or client, evidence of the patient's or client's personal or medical history is not admissible except if:

1. The defendant requests a hearing prior to trial and makes an offer of proof of the relevancy of the evidence; and

2. The court finds that the evidence is relevant and that its probative value outweighs its prejudicial nature.

(b) The court shall limit the evidence admitted under par. (a) to relevant evidence which pertains to specific information or examples of conduct. The court's order shall specify the information or conduct that is admissible and no other evidence of the patient's or client's personal or medical history may be introduced.

(c) Violation of the terms of the order is grounds for a mistrial but does not prevent the retrial of the defendant.

(3m) A court may not exclude evidence in any criminal action or traffic forfeiture action for violation of s. 346.63 (1) or (5), or a local ordinance in conformity with s. 346.63 (1) or (5), on the ground that the evidence existed or was obtained outside of this state.

(4) Upon the motion of any party or its own motion, a court may order that any exhibit or evidence be delivered to the party or the owner prior to the final determination of the action or proceeding if all of the following requirements are met:

(a) There is a written stipulation by all the parties agreeing to the order.

(b) No party will be prejudiced by the order.

(c) A complete photographic or other record is made of any exhibits or evidence so released.

Case Annotations

State v. Mader, 2023 WI App 35, ¶¶ 50–54, 408 Wis. 2d 632, 993 N.W.2d 761 (review denied).

Trial counsel's failure to object to evidence of a sexual-assault victim's use of birth control was not ineffective assistance because, while the rape-shield act's prohibition of evidence of a victim's prior sexual conduct includes use of contraceptives, in this case it was connected to the course of the sexual assaults because there was evidence of the defendant's "apparent preoccupation" with the victim's continued use of birth control during the time when the assaults occurred.

State v. Mulhern, 2022 WI 42, ¶ 2, 402 Wis. 2d 64, 975 N.W.2d 209.

The broad language used to define "sexual conduct" in the rape-shield statute's prohibition includes evidence concerning the victim's lack of sexual intercourse. In the absence of an exception, a victim's testimony regarding lack of sexual intercourse is prohibited. Receipt of the evidence under the facts presented was harmless error.

State v. Stroik, 2022 WI App 11, ¶¶ 55–58, 401 Wis. 2d 150, 972 N.W.2d 640.

In a trial for first-degree sexual assault of a child, evidence that the child had previously accused someone else of a sexual assault was admissible. The test is whether a jury, acting reasonably, could find it is more likely than not that the complainant made prior untruthful allegations of sexual assault. That test was satisfied because the complainant made contrary statements about whether another person had assaulted her, and she expressly recanted her prior accusation in an interview with a county child protective services social worker.

State v. Sarfraz, 2014 WI 78, ¶¶ 52–55, 356 Wis. 2d 460, 851 N.W.2d 235.

The trial court properly excluded evidence of the complainant's alleged past sexual conduct with the defendant. While the evidence was material to the defense of consent, the defendant failed to satisfy the third prong of the *DeSantis* analysis by failing to show that the probative value of the evidence outweighed its prejudicial nature.

State v. Ringer, 2010 WI 69, ¶¶ 25–42, 326 Wis. 2d 351, 785 N.W.2d 448.

The trial court erroneously exercised its discretion in allowing the defendant to introduce evidence of a 12-year-old complainant's prior untruthful allegations of sexual assault. The record failed to establish, as required by *DeSantis*, that a jury could reasonably find the child had made prior untruthful allegations.

State v. St. George, 2002 WI 50, ¶¶ 23–26, 252 Wis. 2d 499, 643 N.W.2d 777.

In a child sexual-assault case, the trial court properly excluded evidence of the five-year-old complainant's prior sexual contact with another child. The evidence was explicitly barred by the rape-shield statute and did not meet the third *Pulizzano* factor—relevance. The nature of the allegation did not show such precocious sexual knowledge that a jury could reasonably infer that sexual contact with the defendant must have occurred.

State v. Dunlap, 2002 WI 19, ¶¶ 14–41, 250 Wis. 2d 466, 640 N.W.2d 112.

In a child sexual-assault case, the trial court properly excluded evidence of the six-year-old complainant's prior overt sexual behavior. The behavior was "sexual conduct" under the rape-shield law, and there was no applicable statutory exception. The defendant did not satisfy the second *Pulizzano* factor because the prior acts did not sufficiently resemble those alleged in the present case. Further, the state did not "open the door" to allow the evidence under the curative admissibility doctrine.

State v. Dodson, 219 Wis. 2d 65, 69–84, 580 N.W.2d 181 (1998).

In this child sexual-assault case, the trial court erred in precluding the defendant from offering evidence of the nine-year-old complainant's prior sexual assault by a third party to show an alternative source of physical injury and sexual knowledge when the state relied on both the injury and knowledge to corroborate the complainant's credibility.

Practice Tip. The *Dodson* opinion contains a useful discussion of the manner of the offer of proof, recommending that in a close case, the trial court should favor a question-and-answer format over the narrative statement of counsel. *Id.* at 73–74.

State v. Jackson, 216 Wis. 2d 646, 656–65, 575 N.W.2d 475 (1998).

The trial court appropriately excluded evidence of the defendant's prior sexual relationship with the complainant concerning her possible motivation to fabricate the charges. While the rape-shield law contains an exception for a complainant's past conduct with a defendant, the defendant's offer of proof failed to meet the materiality and weight-of-probative-evidence requirements in Wis. Stat. § 971.31(11) and *DeSantis*. Further, the state did not "open the door" to the admission of such evidence under the curative admissibility doctrine.

State v. Sharp, 180 Wis. 2d 640, 645–48, 511 N.W.2d 316 (Ct. App. 1993).

The defense attempted to elicit "source of knowledge" evidence that on a previous occasion the complainant, a seven-year-old girl, saw a neighbor boy's genitals during a mutual display. The court determined that the defense made an insufficient showing that the "display" evidence sufficiently resembled an adult's sexual assault.

State v. Wirts, 176 Wis. 2d 174, 182–83, 500 N.W.2d 317 (Ct. App. 1993).

Evidence that a complaining witness had sexual intercourse *after* the date of the charged crime may be admissible per *State v. Pulizzano* to demonstrate that someone else caused the complaining witness's injuries.

State v. Moats, 156 Wis. 2d 74, 102–15, 457 N.W.2d 299 (1990).

The trial court erroneously excluded evidence of prior sexual assaults perpetrated on the five-year-old complainant, which should have been admitted for the limited purpose of establishing an alternative source for her sexual knowledge when the offer of proof made by the defense met the requirements of *Pulizzano* and there was no compelling state interest to outweigh admission.

State v. DeSantis, 155 Wis. 2d 774, 785, 456 N.W.2d 600 (1990).

Before admitting evidence of prior untruthful allegations as an exception to the rape-shield law under Wis. Stat. §§ 972.11(2)(b)3. and 971.31(11), the court must make three determinations: (1) whether the evidence fits within Wis. Stat. § 971.11(2)(b)3., (2) whether it is material to a fact at issue in the case, and (3) whether it is of sufficient probative value to outweigh its inflammatory and prejudicial nature. Here, the trial court appropriately exercised its discretion in excluding the evidence.

> ***Authors' Note.*** As *DeSantis* instructs, it is not enough that the proffered evidence fall within one of the three statutory exceptions in the rape-shield law, Wis. Stat. § 972.11(2). Wis. Stat. § 971.31(11) requires the court, upon pretrial motion, to determine that the evidence is "material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced at trial." *DeSantis* applied that statute in a case involving alleged prior untruthful allegations, under Wis. Stat. § 972.11(2)(b)3., by setting out a three-part analysis that tracks the statutes. In *State v. Ringer*, 2010 WI 69, ¶¶ 30–35, 326 Wis. 2d 351, 785 N.W.2d 448, the court clarified that the first inquiry requires the trial court to determine the conditional relevance of the proffered evidence under Wis. Stat. § 901.04(2), i.e., whether a jury, acting reasonably, could find that it is more likely than not that the complainant made prior untruthful allegations of sexual assault. In *State v. Jackson*, 216 Wis. 2d 646, 659, 575 N.W.2d 475 (1998), the court applied *DeSantis* to the statutory exception for the complainant's prior sexual conduct with the defendant under Wis. Stat. § 972.11(2)(b)1. The court also noted that Wis. Stat. § 971.31(11) inverts the general Wis. Stat. § 904.03 balancing test by assuming a bias that the proffered evidence is more prejudicial than probative. *Jackson*, 216 Wis. 2d at 658.

State v. Pulizzano, 155 Wis. 2d 633, 645–46, 654, 656–57, 456 N.W.2d 325 (1990).

The defendant was denied her rights to confrontation and compulsory process when she was prevented from presenting evidence of a prior sexual assault of a seven-year-old complainant for the sole purpose of establishing an alternative source for the child's sexual knowledge. Confrontation and compulsory process are fundamental to achieving the right to a fair trial and grant defendants the right to present relevant evidence not substantially outweighed by its prejudicial effect. Overcoming the rape-shield statute requires a successful offer of proof that meets a five-prong test: (1) the prior act clearly occurred, (2) the act closely resembled the acts of the present case, (3) the prior act is clearly relevant to a material issue, (4) the evidence is necessary to the defendant's case, and (5) the probative value of the evidence outweighs the prejudicial effect. Upon a successful offer of proof, the burden shifts to the state to establish a compelling interest to overcome the defendant's constitutional right to present evidence. This interest will be reviewed with strict scrutiny.

> ***Authors' Note.*** In *Pulizzano*, the court recognized that the exclusion of evidence under the rape-shield statute may, under some circumstances, collide with the defendant's constitutional rights to confrontation and compulsory process. The court fashioned an analytic approach to resolving the conflict between application of the statute and the defendant's constitutional rights. It is important that counsel and the court always consider that if the statute operates to exclude evidence, the inquiry does not end there; the issue becomes whether the exclusion of the evidence violates the defendant's constitutional rights according to *Pulizzano*.

State v. Childs, 146 Wis. 2d 116, 121–23, 430 N.W.2d 353 (Ct. App. 1988).

A complaining witness may be precluded from testifying to lack of prior sexual activity.

State v. Vonesh, 135 Wis. 2d 477, 490, 401 N.W.2d 170 (Ct. App. 1986).

"Sexual conduct" pursuant to Wis. Stat. § 972.11(2)(a) did not include two notes written by the complaining witness, an 11-year-old girl, when the notes were ambiguous about whether they described actual sexual activity or experiences, as opposed to expressions of desire. The notes were, therefore, admissible.

State v. Gavigan, 111 Wis. 2d 150, 161–62, 330 N.W.2d 571 (1983).

Evidence offered by the state regarding a hymen tear suffered by the complainant was inadmissible as related to her chastity under Wis. Stat. § 972.11 but should have been admitted with an appropriate limiting instruction relating to the element of force in the crime charged.

972.115 Admissibility of defendant's statement.

(1) In this section:

(a) "Custodial interrogation" has the meaning given in s. 968.073(1)(a).

(b) "Law enforcement agency" has the meaning given in s. 165.83(1)(b).

(c) "Law enforcement officer" has the meaning given in s. 165.85(2)(c).

(d) "Statement" means an oral, written, sign language, or nonverbal communication.

(2)(a) If a statement made by a defendant during a custodial interrogation is admitted into evidence in a trial for a felony before a jury and if an audio or audio and visual recording of the interrogation is not available, upon a request made by the defendant as provided in s. 972.10(5) and unless the state asserts and the court finds that one of the following conditions applies or that good cause exists for not providing an instruction, the court shall instruct the jury that it is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony and that the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case:

1. The person refused to respond or cooperate in the interrogation if an audio or audio and visual recording was made of the interrogation so long as a law enforcement officer or agent of a law enforcement agency made a contemporaneous audio or audio and visual recording or written record of the subject's refusal.

2. The statement was made in response to a question asked as part of the routine processing of the person.

3. The law enforcement officer or agent of a law enforcement agency conducting the interrogation in good faith failed to make an audio or audio and visual recording of the interrogation because the recording equipment did not function, the officer or agent inadvertently failed to operate the equipment properly, or, without the officer's or agent's knowledge, the equipment malfunctioned or stopped operating.

4. The statement was made spontaneously and not in response to a question by a law enforcement officer or agent of a law enforcement agency.

5. Exigent public safety circumstances existed that prevented the making of an audio or audio and visual recording or rendered the making of such a recording infeasible.

6. The law enforcement officer conducting the interrogation or the law enforcement officer responsible for observing an interrogation conducted by an agent of a law enforcement agency reasonably believed at the commencement of the interrogation that the offense for which the person was taken into custody or for which the person was being investigated, was not a felony.

(b) If a statement made by a defendant during a custodial interrogation is admitted into evidence in a proceeding heard by the court without a jury in a felony case and if an audio or audio and visual recording of the interrogation is not available, the court may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement unless the court determines that one of the conditions under par. (a)1. to 6. applies.

(4) Notwithstanding ss. 968.28 to 968.37, a defendant's lack of consent to having an audio or audio and visual recording made of a custodial interrogation does not affect the admissibility in evidence of an audio or audio and visual recording of a statement made by the defendant during the interrogation.

(5) An audio or audio and visual recording of a custodial interrogation shall not be open to public inspection under ss. 19.31 to 19.39 before one of the following occurs:

(a) The person interrogated is convicted or acquitted of an offense that is a subject of the interrogation.

(b) All criminal investigations and prosecutions to which the interrogation relates are concluded.

Case Annotations

State v. Moore, 2015 WI 54, ¶¶ 85–91, 363 Wis. 2d 376, 864 N.W.2d 827.

In a trial for a felony, Wis. Stat. § 972.115(2)(a) provides for instructing the jury that it may consider the absence of a recording of a custodial interrogation in evaluating the evidence. Permitting the use of an unrecorded juvenile statement in such a case, however, would be inconsistent with Wis. Stat. § 938.195 (codifying *State v. Jerrell C.J. (In the Interest of Jerrell C.J.)*, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110), which

requires the recording of juvenile interrogations. Although no four members of the court agreed on the proper remedy in a felony criminal case for violating the Wis. Stat. § 938.195 recording requirement, a majority agreed that any error in admitting the confession in this case was harmless.

State v. Banks, 2010 WI App 107, ¶¶ 30–36, 328 Wis. 2d 766, 790 N.W.2d 526.

Trial counsel was not ineffective in failing to ask for a jury instruction under Wis. Stat. § 971.115(2)(a) because the defendant was not under custodial interrogation when he made an unrecorded statement to a police officer.

Index

References in this index from 901 to 911 are to sections of the Wisconsin Rules of Evidence, and references to letters A, B, and C are to appendices in this book.

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